



**Dora**  
Department of Regulatory Agencies

**Office of Policy, Research and Regulatory Reform**

# **2013 Sunset Review: Licensure of Home Care Agencies**

October 15, 2013





**Executive Director's Office**

Barbara J. Kelley  
Executive Director

John W. Hickenlooper  
Governor

October 15, 2013

Members of the Colorado General Assembly  
c/o the Office of Legislative Legal Services  
State Capitol Building  
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of the licensure of home care agencies. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2014 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination....

The report discusses the question of whether there is a need for the regulation provided under Article 27.5 of Title 25, C.R.S. The report also discusses the effectiveness of the Colorado Department of Public Health and Environment and staff in carrying out the intent of the statutes and makes recommendations for statutory changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Barbara J. Kelley  
Executive Director





John W. Hickenlooper  
Governor

Barbara J. Kelley  
Executive Director

## **2013 Sunset Review: Licensure of Home Care Agencies**

### **Summary**

#### ***What Is Regulated?***

In Colorado, home care agencies that provide healthcare and personal care services to individuals in their homes are required to be licensed, and home care placement agencies (placement agencies) that refer independent contractors to provide healthcare and personal care services to individuals in their homes are required to be registered.

#### ***Why Is It Regulated?***

The licensure of home care agencies ensures that the health, safety, and welfare of home care consumers are protected. The registration of placement agencies is simply a list, providing little public protection.

#### ***Who Is Regulated?***

A home care agency must be licensed in order to provide skilled healthcare and personal care services in a consumer's home. In fiscal year 11-12, 547 home care agency licenses were issued. As of September 18, 2013, there were 50 registered placement agencies.

#### ***How Is It Regulated?***

The Colorado State Board of Health adopts rules for the home care licensing program. The Health Facilities and Emergency Medical Services Division (Division) in the Colorado Department of Public Health and Environment regulates home care agencies and home care placement agencies (placement agencies). The Division surveys home care agencies to ensure they are fit to provide healthcare and personal care services in consumers' homes. The Division has the authority to deny, revoke, suspend, refuse to renew, and fine home care agencies. The Division may also impose intermediate restrictions or conditions on a licensee.

Placement agencies are required to annually notify the Division if they are providing home care referrals, and the Division maintains a list of placement agencies and makes the list accessible to the public. The Division may assess a civil fine of not less than \$500 and not more than \$1,000 to anyone who fails to register as a placement agency, or for a placement agency that claims to be licensed or certified by the Division.

#### ***What Does It Cost?***

In fiscal year 11-12, the total expenditures to oversee the home care licensing program were \$590,000, and there were 6.32 full-time equivalent employees associated with the program.

#### ***What Disciplinary Activity Is There?***

Between fiscal years 09-10 and 11-12, the Division denied three licenses, imposed two conditional licenses, and fined one home care agency.

## Key Recommendations

### ***Continue the licensure of home care agencies for nine years, until 2023.***

Home care agencies are licensed in Colorado to ensure the health, safety, and welfare of consumers. The Division regulates home care agencies to determine whether they are fit to provide skilled healthcare and personal care services in consumers' homes.

### ***Amend the requirement for the criminal history record check of home care agencies to clarify which owners must undergo a criminal history record check and to require each administrator (or manager) to undergo a criminal history record check.***

Currently, each owner, applicant, or licensee is required to undergo a criminal history record check in order to prevent organized crime from operating in home care and to protect home care consumers. While owners have legal control of the business, administrators manage and control the day-to-day operations of the agency. Therefore, a criminal history record check should be conducted on anyone who controls or influences the operations of the business.

### ***Strengthen criminal history record checks of employees of home care agencies and referrals of home care placement agencies.***

Home care agencies and placement agencies are statutorily required to perform criminal history record checks before hiring or placing any person. However, there are no established disqualifying crimes. Considering the vulnerability of home care consumers, some disqualifying crimes should be established.

## Major Contacts Made During This Review

Alliance  
ARC of Adams County  
ARC of Arapahoe & Douglas Counties  
Colorado Department of Health Care Policy & Financing  
Colorado Department of Public Health & Environment  
Centers for Hospice & Palliative Care  
Centers for Medicare & Medicaid Services  
Colorado Cross-Disability Coalition  
Colorado Department of Human Services  
Colorado Attorney General's Office  
Colorado Gerontological Society  
Colorado Long-Term Assistance Providers  
Home Care Association of America, Colorado  
Home Care Association of Colorado  
Legal Center for People with Disabilities & Older Persons, The  
Private Care Association  
Professional Pediatric Homecare Association

## What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are Prepared by:  
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## Background

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### Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria<sup>1</sup> and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

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<sup>1</sup> Criteria may be found at § 24-34-104, C.R.S.

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- Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subparagraph (i) of paragraph (a) of subsection (8) of this section shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification; and
  - Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

### ***Types of Regulation***

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

#### Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection – only those individuals who are properly licensed may use a particular title(s) – and practice exclusivity – only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

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## Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

## Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements – typically non-practice related items, such as insurance or the use of a disclosure form – and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

## Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency – depending upon the prescribed preconditions for use of the protected title(s) – and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

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## Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

## **Sunset Process**

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: [www.dora.colorado.gov/opr](http://www.dora.colorado.gov/opr).

The regulatory functions of the Colorado State Board of Health (Board of Health) and the Health Facilities and Emergency Medical Services Division (Division) in the Colorado Department of Public Health and Environment (CDPHE), as enumerated in Article 27.5 of Title 25, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2014, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the administration of home care agency licensing by the Division pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation of home care agencies should be continued for the protection of the public and to evaluate the performance of the Division. During this review, the Division must demonstrate that the regulation serves to protect the public health, safety or welfare, and that the regulation is the least restrictive regulation consistent with protecting the public. DORA's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

## **Methodology**

As part of this review, DORA staff attended advisory committee meetings, interviewed Division staff, interviewed officials with state and national professional associations, interviewed home care agency staff and owners, reviewed Colorado statutes and Board of Health rules, and reviewed the laws of other states.

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## **Profile of the Industry**

Home care is becoming an increasingly viable and attractive alternative to facility-based long-term care (nursing homes and assisted living), and it is only expected to grow in popularity as baby boomers age.

Home care covers a wide range of services for individuals who require ongoing healthcare and assistance with the activities of daily living. When family and friends cannot provide adequate support, home care allows people to receive the care they need to remain in their homes.<sup>2</sup>

The individuals who receive home care may be elderly, disabled, terminally or chronically ill, or they may be recovering from surgery. While the majority of individuals receiving home care are over the age of 65, home care consumers may be any age, beginning with infants who may need ventilators or other care in order to live at home.

Home care agencies deliver services through physicians, nurses, therapists, social workers, home health and personal care aides, and volunteers.<sup>3</sup>

Home care may include health-related services such as injections, intravenous therapy, and wound care. It may include assistance with personal care, such as getting in and out of bed, walking or mobility, bathing, using the toilet, and dressing, and it may also include assistance with household tasks, such as laundry, meal preparation, general housekeeping, and shopping.<sup>4</sup>

Home care services may be paid for by an individual or family member, by health insurance companies, managed care organizations, the Veteran's Administration, community organizations, Social Services Block Grants, Medicare, Medicaid, and other sources.<sup>5</sup>

Most states license home care agencies, but licensure requirements vary widely from state to state. Forty-four states, including Colorado, require a license for agencies that provide home health services (e.g., medication administration, injections, intravenous therapy, and wound care), and 30 states, including Colorado, additionally require a license for agencies that provide personal care services.

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<sup>2</sup> National Association for Home Care and Hospice. *What is Home Care?* Retrieved on November 2, 2012, from <http://www.nahc.org/consumer/FAQs/whatis.html>

<sup>3</sup> National Association for Home Care and Hospice. *Who Provides Home Care?* Retrieved on November 2, 2012, from <http://www.nahc.org/consumer/FAQs/whoprovides.html>

<sup>4</sup> National Association for Home Care and Hospice. *What Types of Services Do Home Care Providers Deliver?* Retrieved on November 2, 2012, from <http://www.nahc.org/consumer/FAQs/services.html>

<sup>5</sup> National Association for Home Care and Hospice. *Who Pays for Home Care Services?* Retrieved on November 2, 2012, from <http://www.nahc.org/consumer/FAQs/whopays.html>

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In order to receive funds from Medicare and Medicaid, home care agencies must meet minimum federal standards.<sup>6</sup>

Colorado licenses two types of home care agencies: Class A and Class B. Only Class A agencies may provide home health services. Both Class A and Class B agencies provide assistance with personal care, medication reminders, companionship, and homemaking services.

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<sup>6</sup> National Association for Home Care and Hospice. *Who Provides Home Care?* Retrieved on November 2, 2012, from <http://www.nahc.org/consumer/FAQs/whoprovides.html>

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## Legal Framework

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### *History of Regulation*

In 2008, the General Assembly passed Senate Bill 08-153 (SB 153), which required home care agencies to be licensed by the Health Facilities and Emergency Medical Services Division (Division) in the Colorado Department of Public Health and Environment (CDPHE) and charged the Colorado State Board of Health (Board of Health) with adopting rules for the licensing program.

The purpose of regulation was to address a growing concern regarding the provision of care by home care agencies, specifically improper patient care and criminal activity. Although individuals could be prosecuted for fraud or abuse of patients, privately-funded home health agencies could not be removed from the marketplace since they were not regulated, and serious problems were found in home care agencies that were certified as Medicare and Medicaid providers.

The bill required home care agencies to ensure that their employees were adequately trained and vetted.

Senate Bill 153 also required home care placement agencies<sup>7</sup> (placement agencies) to register with the Division. It required placement agencies to perform criminal history record checks in order to refer individuals to provide skilled health and personal care services<sup>8</sup> in the home, and they were also required to provide a disclosure to consumers concerning the duties and employment status of the individual providing services.

In 2010, the General Assembly passed Senate Bill 10-194 (SB 194), which placed a moratorium on the licensure requirement for Community Centered Boards (CCBs) and agencies that provide services to persons with developmental disabilities. This moratorium expired in March 2011. Senate Bill 194 also exempted qualified early intervention service providers for children with developmental disabilities.

In 2012, the General Assembly passed House Bill 12-1294, which impacted the regulation of all health facilities in Colorado. Specifically, it required the Board of Health to establish different requirements appropriate to the various types of home care agencies, such as those that are substantially funded through Medicare or Medicaid and Providers of All-Inclusive Care for the Elderly.

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<sup>7</sup> Home care placement agencies provide referrals for home care attendants, for a fee, and do not employ or contract with home care attendants.

<sup>8</sup> Personal care services include, but are not limited to, getting in and out of bed, walking or mobility, bathing, using the toilet, and dressing.

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## Summary of Current Laws

### Licensing

Home care agencies are required to be licensed by the Division in order to provide skilled home health services and personal care services to consumers in their homes.<sup>9</sup> The Board of Health housed in CDPHE is charged with adopting rules for licensing home care agencies.<sup>10</sup>

A home care agency is defined as

any sole proprietorship, partnership, association, corporation, government or governmental subdivision or agency[...], not-for-profit agency, or any other legal or commercial entity that manages and offers, directly or by contract, skilled home health services or personal care services to a home care consumer in the home care consumer's temporary or permanent home or place of residence. A residential facility that delivers skilled home health or personal care services which the facility is not licensed to provide shall either be licensed as a home care agency or require the skilled home health or personal care services to be delivered by a licensed home care agency.<sup>11</sup>

Skilled home health services are defined as

health and medical services furnished to a home care consumer in the home care consumer's temporary or permanent home or place of residence that include wound care services; use of medical supplies including drugs and biologicals prescribed by a physician; in-home infusion services; nursing services; home health aide or certified nurse aide services that require the supervision of a licensed or certified healthcare professional acting within the scope of his or her license or certificate; occupational therapy; physical therapy; respiratory care services; dietetics and nutrition counseling services; medication administration; medical social services; and speech-language pathology services. "Skilled home health services" does not include the delivery of either durable medical equipment or medical supplies.<sup>12</sup>

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<sup>9</sup> § 25-27.5-103(1), C.R.S.

<sup>10</sup> § 25-27.5-104(1), C.R.S.

<sup>11</sup> § 25-27.5-102(3)(a), C.R.S.

<sup>12</sup> § 25-27.5-102(7), C.R.S.

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Personal care services are defined as

assistance with activities of daily living, including but not limited to bathing, dressing, eating, transferring, walking or mobility, toileting, and continence care. It also includes housekeeping, personal laundry, medication reminders, and companionship services furnished to a home care consumer in the home care consumer's temporary or permanent home or place of residence, and those normal daily routines that the home care consumer could perform for himself or herself were he or she physically capable, which are intended to enable that individual to remain safely and comfortably in the home care consumer's temporary or permanent home or place of residence.<sup>13</sup>

The following entities are specifically required to obtain a home care license:<sup>14</sup>

- A CCB that provides case management services to persons with developmental disabilities that is directly providing home health or in-home personal care services to persons with developmental disabilities; and
- An agency that provides services to persons with developmental disabilities that is providing home health and in-home personal care services pursuant to the supported living services waiver and the children's extensive support waiver home and community-based service programs.

A home care agency does not include:<sup>15</sup>

- An organization that provides only housekeeping services;
- A community and rural health network that furnishes home visits for the purpose of public health monitoring and disease tracking;
- An individual who is not employed by or affiliated with a home care agency and who acts alone, without employees or contractors;
- An outpatient rehabilitation agency or comprehensive outpatient rehabilitation facility certified pursuant to Title XVIII or XIX of the "Social Security Act";
- A consumer-directed attendant program administered by the Colorado Department of Health Care Policy and Financing (HCPF);
- A licensed dialysis center that provides in-home dialysis services, supplies, and equipment;
- A home care placement agency; or
- Services provided by a qualified early intervention service provider and overseen jointly by the Colorado Department of Education and the Colorado Department of Human Services.

As a health facility, a home care agency must apply for a license annually.<sup>16</sup>

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<sup>13</sup> § 25-27.5-102(6), C.R.S.

<sup>14</sup> § 25-27.5-103(1.5)(b), C.R.S.

<sup>15</sup> § 25-27.5-102(3)(b), C.R.S.

<sup>16</sup> §§ 25-3-102(1)(a) and 25-3-101(1), C.R.S.

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In order to license a home care agency, the Division is charged with determining an applicant's fitness to conduct and maintain a home care agency.<sup>17</sup> By rule, the Division may determine fitness through a number of different measures including, but not limited to, review of the applicant's policies and procedures, physical inspection of the entity, credentials of staff, and interviews with staff. The Division may conduct unscheduled or unannounced surveys (which may also be referred to as inspections) for a number of reasons such as routine compliance inspection, reasonable cause to question the applicant's fitness to conduct or maintain a home care agency, and a complaint alleging noncompliance with licensing requirements.<sup>18</sup>

Each home care agency owner, applicant, or licensee must submit a set of fingerprints to the Division and undergo a state and national criminal history record check. A home care agency license may not be issued or renewed if an owner, applicant, or licensee has been convicted of a felony or misdemeanor involving moral turpitude or conduct that could pose a risk to the health, safety, or welfare of consumers.<sup>19</sup>

Provisional licenses are available for two consecutive 90-day periods upon successful completion of the criminal history record check.<sup>20</sup>

By rule, a provisional license is available if the home care agency is temporarily unable to comply with all of the licensing standards and provides proof that it is making attempts to comply. The Division will not issue a provisional license if the operation of the home care agency will adversely affect the health, safety, and welfare of the home care clients. The Division will also issue a provisional license, if requested by the HCPF, to a home care agency that has applied for Medicaid certification.<sup>21</sup>

Home care agencies are also required to maintain and provide evidence of liability insurance coverage, or a surety bond in lieu of liability insurance.<sup>22</sup> The Board of Health requires agencies that provide skilled home health services to have liability insurance coverage of at least \$500,000 per occurrence and \$3 million for all occurrences in a year, and it requires agencies that only provide personal care, homemaker, and companion services to maintain liability insurance coverage of at least \$100,000 per occurrence and \$300,000 for all occurrences in a year.<sup>23</sup>

Anyone operating a home care agency without a license is guilty of a misdemeanor, punishable by not less than \$50 and not more than \$500, and may be assessed a civil fine of up to \$10,000.<sup>24</sup>

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<sup>17</sup> § 25-3-102(1)(c), C.R.S.

<sup>18</sup> 6 C.C.R. 1011-1 Standards for Hospitals and Health Facilities Rules §§ 2.8.1 and 2.11.4.

<sup>19</sup> §§ 25-27.5-106(3)(a) and 25-27.5-108(3), C.R.S.

<sup>20</sup> § 25-27.5-106(6), C.R.S.

<sup>21</sup> 6 CCR 1011-1 Home Care Agencies Rules § 5.3.

<sup>22</sup> § 25-27.5-104(1)(h), C.R.S.

<sup>23</sup> 6 CCR 1011-1 Home Care Agencies Rule § 5.2(B).

<sup>24</sup> §§ 25-27.5-103(1)(a) and (b), C.R.S.

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Placement agencies provide referrals for home care attendants, for a fee, and do not employ or contract with home care attendants.<sup>25</sup> Placement agencies are not required to be licensed, but they are required to annually notify the Division that they are providing home care referrals. The Division must maintain a list of placement agencies and make the list accessible to the public.<sup>26</sup>

The Division may assess a civil fine of not less than \$500 and not more than \$1,000 to anyone who fails to register a placement agency, or for a placement agency that claims to be licensed or certified by the Division.<sup>27</sup>

Home care agencies and placement agencies are required to conduct a criminal history record check not more than 90 days prior to employing or placing any home care attendant.<sup>28</sup>

### Disciplinary Actions

The Division may deny, suspend, revoke, or refuse to renew a license.<sup>29</sup>

The Division may also impose intermediate restrictions or conditions on a licensee such as.<sup>30</sup>

- Retaining a consultant to address corrective measures;
- Monitoring;
- Requiring additional training of staff;
- Complying with a written plan to correct a violation; and
- Fining up to \$10,000 for all violations.

Any civil fines the Division collects from home care agencies must be credited to the cash fund for home care agencies to be used to pay for expenses related to:<sup>31</sup>

- Monitoring home care agencies;
- Educating licensees;
- Educating home care consumers and their families;
- Providing technical assistance to home care agencies to comply with changes in state or federal law;
- Transitioning consumers to other home care agencies in case of a revocation; and
- Maintaining the operation of a home care agency pending the correction of a violation.

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<sup>25</sup> § 25-27.5-102(5), C.R.S.

<sup>26</sup> §25-27.5-103(2)(a), C.R.S.

<sup>27</sup> § 25-27.5-103(2)(b), C.R.S.

<sup>28</sup> § 25-27.5-107, C.R.S.

<sup>29</sup> §§ 25-27.5-108(1) and (2)(a), C.R.S.

<sup>30</sup> § 25-27.5-108(2)(b)(I), C.R.S.

<sup>31</sup> § 25-27.5-108(2)(b)(V), C.R.S.

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## Board of Health and Home Care Advisory Committee

The Board of Health is required to establish rules for minimum standards of operation for home care agencies. The Board of Health has established different standards depending on the type of home care services provided (i.e., Class A and Class B agencies), as required by statute.<sup>32</sup>

These rules include:<sup>33</sup>

- Inspection of home care agencies by the Division;
- Minimum qualifications for an administrator and staff of a home care agency;
- Requirements for disclosures to consumers;
- Intermediate enforcement remedies;
- A requirement for home care agencies to submit a form detailing measures to be taken to correct deficiencies found during inspections; and
- Fees.

As directed by statute, the Board of Health requires home care agencies to report certain occurrences including:<sup>34</sup>

- The death of a patient arising from an unexplained cause or suspicious circumstances;
- Serious injuries to a patient;
- Physical, sexual, or verbal abuse of a patient;
- Neglect of a patient;
- Misappropriation of a patient's property; and
- Diversion of drugs intended for a patient.

The Board of Health also requires, as directed by statute, an administrator and staff of a home care agency to be of good, moral, and responsible character.<sup>35</sup>

The Home Care Advisory Committee (Advisory Committee) was established to make recommendations to the Board of Health and to the Division regarding home care licensing rules and the implementation of a licensure program.<sup>36</sup>

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<sup>32</sup> § 25-27.5-104(1), C.R.S.

<sup>33</sup> §§ 25-27.5-104(1)(a), (b), (c), (d), (e), and (g), C.R.S.

<sup>34</sup> §§ 25-27.5-104(1)(f) and 25-1-124(2), C.R.S.

<sup>35</sup> § 25-27.5-104(1)(b), C.R.S.

<sup>36</sup> § 25-27.5-104(3), C.R.S.

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The members of the Advisory Committee are appointed by the Executive Director of CDPHE and must, at a minimum, consist of:<sup>37</sup>

- Representatives from Class A agencies;
- Representatives from Class B agencies;
- Members of the disabled community who are home care consumers;
- Seniors or representatives of seniors who are home care consumers;
- Providers of Medicaid services;
- Providers of in-home support services; and
- Representatives of HCPF and the Colorado Department of Human Services.

Advisory Committee members serve at the pleasure of the Executive Director without compensation.<sup>38</sup>

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<sup>37</sup> § 25-27.5-104(3), C.R.S.

<sup>38</sup> § 25-27.5-104(3), C.R.S.

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## Program Description and Administration

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The Health Facilities and Emergency Medical Services Division (Division) in the Colorado Department of Public Health and Environment (CDPHE) regulates home care agencies and home care placement agencies (placement agencies).

The Colorado State Board of Health (Board of Health) is vested with the authority to adopt rules for home care agencies and placement agencies. The Board of Health sets the minimum standards for the operation of home care agencies.

The Division licenses two types of home care agencies:

- Class A agencies provide skilled healthcare services (e.g., medication administration, injections, intravenous therapy, and wound care), personal care services (e.g., getting in and out of bed, walking or mobility, bathing, using the toilet, and dressing), and other services such as homemaker and companion services.
- Class B agencies provide personal care services and other services such as homemaker and companion services. However, they are not licensed to provide skilled healthcare services.

The Home Care Advisory Committee (Advisory Committee) is appointed by the Executive Director of CDPHE to make recommendations to the Board of Health and the Division regarding the rules and the implementation of the home care licensure program.

The Advisory Committee meets monthly to discuss rule changes and issues with the home care agency licensing program.

Table 1 shows the Division's expenditures and the full-time equivalent (FTE) employees associated with the program over the four fiscal years indicated, which constitute the entire life of the program.

**Table 1**  
**Agency Fiscal Information**

<b>Fiscal Year</b>	<b>Total Program Expenditure</b>	<b>FTE</b>
08-09	\$35,559	0.35
09-10	\$487,380	5.44
10-11	\$708,049	7.45
11-12	\$589,958	6.32

In fiscal year 08-09, licensure had not begun and the staff and expenditures were dedicated to setting up a regulatory program. In fiscal year 09-10 and fiscal year 10-11, an increase in workload required to process applications and survey (or inspect) home care agencies for initial licensure led to an increase in staff and expenditures.

Table 2 includes the licensing fees for Class A and Class B agencies in fiscal year 12-13.

**Table 2  
Licensing Fees  
Fiscal Year 12-13**

Fee Type	Class A Fee	Class B Fee
Initial	\$3,000	\$2,200
Renewal*	\$1,550	\$1,325
Late Fee	100% of Renewal Fee	100% of Renewal Fee
Branch	\$200	\$200
Workstation	\$50	\$50
Conditional	\$1,500	\$1,500
Provisional	15% of initial fee	15% of initial fee
Additional Inspections	100% of initial or renewal fee	100% of initial or renewal fee
Name Change	\$75	\$75
Address Change	\$75	\$75

\*Renewal fees are based on the annual admissions for the previous year: for admissions between 50 and 99, add an additional \$100 to the renewal fee listed in the chart; and for admissions above 100, add \$200 to the renewal fee listed in the chart.

Additionally, each home care agency that provides Medicare or Medicaid services receives a \$100 discount from its renewal fee.

Licensing fees are imposed by the Division to cover the cost of regulating home care agencies and the workload resulting from the above activities. Placement agencies are required to register with the Division, but they are not charged a registration fee.

## **Licensing**

Colorado requires home care agencies to obtain a license in order to provide healthcare and personal care services in the home.

In order to apply for a license, an organization or individual must send the Division a letter of intent. Once received, the Division mails the licensing application. Then the applicant must complete the following steps:

- Submit an application;
- Submit evidence of liability insurance or a surety bond; and
- Submit evidence of workers' compensation insurance.

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The Division reviews an application and performs a criminal history record check on the owner, applicant, or licensee. Once the application is complete, staff performs an initial licensing survey of the home care agency.

If the Division finds the home care agency does not meet the minimum standards established by the Board of Health, the applicant is provided notice and time to make corrections. When the Division finds the home care agency is in compliance with the minimum standards, then a license is granted.

The Division may grant a provisional license if a home care agency cannot comply with all the standards as long as it provides proof that it is working toward compliance. It may also provide a provisional license if one is requested by the Colorado Department of Health Care Policy and Financing for a home care agency that has applied for Medicaid certification. The Division will not issue a provisional license to a home care agency until the criminal history record check is complete or if the health, safety, or welfare of its clients is at risk.

Home care licenses are valid for one year.

Table 3 shows the licensing activity for home care agencies during the fiscal years indicated.

**Table 3**  
**Licensed Home Care Agencies**

<b>Fiscal Year</b>	<b>Class A</b>	<b>Class B</b>	<b>Total Licenses</b>
09-10	193	159	352
10-11	224	265	489
11-12	236	311	547

The requirement to obtain a license for home care agencies was phased in by license type. Class A agencies were required to obtain a license by January 1, 2010. Class B agencies were required to obtain a license by January 1, 2011. Agencies that provide in-home personal care services to persons with developmental disabilities were required to obtain a license by September 1, 2011.

Initial licensing of existing home care agencies spanned all three fiscal years. Since the licensing of home care agencies is a new regulatory program and Table 3 constitutes the life of the program, the licensing activity above is not necessarily indicative of new growth in home care agencies.

Placement agencies are required to be registered with the state. The state has little regulatory authority over placement agencies. As of September 18, 2013, 50 placement agencies were listed with the Division.

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## Surveys

Before granting a license, the Division evaluates an applicant's fitness to conduct and maintain a home care agency. Part of this evaluation is a survey (which may also be referred to as an inspection) of the home care agency. Following an initial survey, the Division surveys each licensed home care agency every three years. Home care agencies that are certified by Medicare and Medicaid and maintain an approved accreditation are surveyed by the Division less frequently – only 10 percent of these agencies are surveyed each year. Home care agencies may also undergo a survey when a complaint is filed.

Table 4 shows the number of surveys of home care agencies over the fiscal years indicated.

**Table 4**  
**Class A and Class B Agency Surveys**

<b>Fiscal Year</b>	<b>Initial Surveys</b>	<b>Renewal Surveys</b>
09-10	98	0
10-11	145	42
11-12	101	64
<b>Total</b>	<b>344</b>	<b>106</b>

Existing home care agencies with Medicare and Medicaid certification were exempted from the initial survey requirement in 2009. However, these agencies will subsequently be required to submit to periodic surveys, which are more comprehensive than initial surveys.

## Occurrence Reporting

Home care agencies are required to report certain events or “occurrences” to the Division by the next business day. Home care agencies report occurrences through an internet portal and may submit them any day of the week or time of day. The Division prepares a summary of all reported occurrences and makes them available to the public.

Any identifying information about specific individuals in occurrence reports is redacted from the reports released to the public.

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Table 5 includes the occurrence reports made by home care agencies over the fiscal years indicated.

**Table 5**  
**Occurrence Reports**  
**Class A and Class B Agencies**

<b>Nature of Occurrences</b>	<b>FY 08-09</b>	<b>FY 09-10</b>	<b>FY 10-11</b>	<b>FY 11-12</b>
Abuse/Physical	0	4	8	15
Abuse/Sexual	0	1	5	2
Abuse/Verbal	0	1	4	4
Brain Injury	0	0	0	1
Deaths	2	11	8	9
Diverted Drugs	1	13	34	40
Equipment Malfunction	0	1	3	1
Misappropriation of Property	4	53	86	110
Missing Patient	0	0	1	4
Neglect	0	6	11	15
<b>Total</b>	<b>7</b>	<b>90</b>	<b>160</b>	<b>201</b>

About 55 percent of reported occurrences concern theft of client property. About 20 percent of occurrences concern diversion of client drugs, and about 17 percent of occurrences concern abuse and neglect of clients.

The Division does not necessarily open a complaint upon receiving an occurrence report. The initial responsibility for investigating an occurrence and taking appropriate corrective action lies with the home care agency. However, the Division does work with the home care agency to determine whether the home care agency is responding appropriately.

If the Division finds that a home care agency is not responding to an incident appropriately, then the Division will investigate the incident and may survey the home care agency. When the Division finds a problem with a home care agency that may put consumers at risk, the Division works with the home care agency to address the problem.

The Division also reviews occurrence reports during a survey and may also review them during a complaint investigation.

The Division requires occurrences to be reported to all other appropriate authorities, such as law enforcement and social services, when an allegation is made, not after a home care agency has investigated an incident.

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## Complaints/Disciplinary Actions

The Division receives and investigates complaints from any member of the public, including home care clients and their family members, home care workers, other government agencies, and adult protective services. Family members are the most common source of complaints.

Table 6 illustrates the complaints filed against home care agencies over the four fiscal years indicated.

**Table 6  
Complaints  
Class A and Class B Agencies**

Nature of Complaints	FY 08-09	FY 09-10	FY 10-11	FY 11-12
Abuse	0	1	1	2
Administration/Personnel	0	1	7	2
Admission/Transfer/Discharge	0	2	5	12
Death	1	0	0	0
Falsification of Records	0	0	0	1
Quality of Care/Treatment	0	5	19	24
Theft	0	1	7	4
Unqualified Personnel	0	1	6	9
<b>Total</b>	<b>1</b>	<b>11</b>	<b>45</b>	<b>54</b>

About 43 percent of the complaints concern the quality of care or treatment being provided by home care agencies. About 17 percent of the complaints concern home care agencies that do not start services when they are supposed to or that do not give notice to a consumer that they are ending services, and 14 percent of the complaints concern unqualified personnel (e.g., home care workers who lack appropriate training or lay persons who are delegated tasks such as administering narcotics).

Although the Division sometimes receives complaints from consumers about placement agencies, it does not have authority to investigate these complaints.

Table 7 includes all final agency actions taken against home care agencies over the period under review.

**Table 7  
Final Agency Actions**

Type of Action	FY 09-10	FY 10-11	FY 11-12
Revocation	0	0	0
Suspension	0	0	0
Conditional License	0	1	1
License Denied	0	0	3
Fine	0	0	1
<b>Total</b>	<b>0</b>	<b>1</b>	<b>5</b>

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According to the Division, since home care licensing is a new regulatory program, the focus of the Division has been on bringing home care agencies up to the minimum standards established by the Board of Health and not on punitive actions.

Nevertheless, in fiscal year 11-12, the first full year during which licenses were required, the Division denied three home care licenses. The Division also imposed a conditional license on a home care agency and imposed a fine.

One agency was denied a license in part due to the applicant's history, which included drug diversion and failure to complete a peer assistance program for drug abuse.

A home care agency license may not be issued or renewed if an owner, applicant, or licensee has been convicted of a felony or misdemeanor involving moral turpitude or conduct that could pose a risk to the health, safety, or welfare of consumers.<sup>39</sup> One agency was denied a license due to the applicant's criminal history, which included prostitution.

Table 8 shows the fines imposed by the Division over the life of the program.

**Table 8**  
**Fines**

<b>Fiscal Year</b>	<b>Number of Fines Imposed</b>	<b>Total Value of Fines Imposed</b>
08-09	0	\$0
09-10	0	\$0
10-11	0	\$0
11-12	1	\$10,000

In fiscal year 11-12, the Division fined one home care agency for operating without a license. The Division later denied the home care agency a license due to Medicaid fraud.

Given the limited nature of the regulatory program for placement agencies, the Division has no authority to investigate complaints against placement agencies, and it may only fine them for failure to register or for claiming to be licensed or certified.

The Division has limited fining authority on placement agencies: It may fine a placement agency for failure to register or for claiming to be licensed or certified. During the period under review, it did not fine any placement agencies.

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<sup>39</sup> §§ 25-27.5-106(3)(a) and 25-27.5-108(3), C.R.S.

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## **Analysis and Recommendations**

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### ***Recommendation 1 – Continue the licensure of home care agencies for nine years, until 2023.***

The laws that govern home care agencies are contained in Article 27.5 of Title 25, Colorado Revised Statutes (C.R.S.) (Act). The Colorado Department of Public Health and Environment (CDPHE) is vested with the authority to license home care agencies and to register home care placement agencies (placement agencies). The home care licensure and registration program is housed within the Health Facilities and Emergency Medical Services Division (Division) in CDPHE, and the Division handles the licensing, enforcement, surveys (which may also be referred to as inspections), and complaint investigations of home care agencies. The Colorado State Board of Health (Board of Health) promulgates rules for home care agencies and placement agencies.

Sunset reviews are guided by statutory criteria found in section 24-34-104, C.R.S., and the first criterion asks whether regulation is necessary to protect the health, safety and welfare of the public.

Today, more and more people are opting to receive long-term care at home rather than in a nursing home. All states have licensed nursing homes since the 1950s, but it wasn't until 2009 that Colorado started licensing home care agencies.

Whether an individual receives long-term care in a facility or at home, the risk of harm is the same. Problems in long-term care include substandard care, neglect, abuse, and exploitation, but when the client is receiving care at home, these problems are much more difficult to detect and prove. Often only the client and the home care worker are present during a home care visit, and a client may be so isolated that the only social contact may be through a home care worker. This puts the home care worker in a position of power that can easily be abused.

The majority of persons who require home care are 65 or older, but home care recipients may be of any age. They may be terminally ill, convalescing at home after surgery or a serious illness, or they may have a physical, intellectual, or developmental disability. While some people who receive home care may be fairly sophisticated consumers, others may not be able to communicate or advocate for themselves at all.

If a home care agency provides substandard care, its clients' health may deteriorate so that they require emergency care or hospitalization, or in some cases they may die prematurely. In addition to substandard care, consumers are also at risk of neglect, abuse, and exploitation by home care workers and the agencies that employ them.

The Division not only licenses home care agencies, it also surveys them for compliance with state and federal requirements for Medicaid and Medicare payment.

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Before Colorado required home care agencies to be licensed, the Division was performing surveys for Medicaid and Medicare. At this time, the Division found numerous cases of substandard care that resulted in death and permanent injury in home care agencies that were certified as Medicaid and Medicare providers. The Division also confirmed cases of certified agencies systematically diverting narcotics and other medication from clients and certified agencies covering up sexual abuse allegations.

Considering the risk of harm in home care and the vulnerability of home care clients, state licensure is necessary.

Additionally, Medicare and Medicaid fraud is a serious problem in home health agencies and in healthcare in general. According to federal law enforcement, organized criminal groups moved from fraudulent stock schemes in the 1990s to mortgage fraud in the last decade, and now they are active in healthcare fraud.<sup>40</sup> These groups have found Medicare and Medicaid to be more lucrative and less dangerous than traditional organized criminal activities.<sup>41</sup>

Medicare fraud in the United States is estimated to total between \$60 and \$90 billion a year, and Medicaid fraud is estimated to be about the same.<sup>42</sup>

The Division protects the public by determining whether an applicant is fit to conduct and maintain a home care agency. It evaluates fitness through a number of different measures including, but not limited to, a review of the applicant's policies and procedures, a physical inspection of the entity, a review of the credentials of staff, observation of care being provided, and interviews with staff and clients. The Division also determines fitness by conducting fingerprint-based criminal history record checks of owners, applicants, or licensees.

Similarly, home care agencies and placement agencies themselves are required to conduct a criminal history record check within 90 days prior to employment.<sup>43</sup> A criminal history record check of home care employees helps to reduce the risk of abuse and exploitation of vulnerable persons.

The Division protects the public by surveying home care agencies to ensure compliance with minimum standards of care, and it investigates home care agencies when it receives a complaint alleging noncompliance with licensing standards.

The Division also protects the public from home care agencies that jeopardize their clients' health. It has the authority to suspend, revoke, deny, or refuse to renew licenses. It also has the authority to impose intermediate restrictions or conditions on a licensee in order to bring it up to the standards established by the Board of Health.

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<sup>40</sup> William K. Rashbaum, "A \$250 Million Fraud Scheme Finds a Path to Brighton Beach," *The New York Times*, February 29, 2012.

<sup>41</sup> Merrill Matthews, "Medicare and Medicaid Fraud is Costing Taxpayers Billions," *Forbes*, May 31, 2012.

<sup>42</sup> Merrill Matthews, "Medicare and Medicaid Fraud is Costing Taxpayers Billions," *Forbes*, May 31, 2012.

<sup>43</sup> § 25-27.5-107, C.R.S.

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During the period under review the Division licensed about 550 home care agencies, and it surveyed about 450 home care agencies.

Since the regulation of home care agencies is new and licensing of existing businesses spanned all three years under review, it is difficult to assess the effectiveness of the Division in addressing the issues affecting the public interests as noted above.

According to the Division, it has focused on bringing home care agencies up to the minimum standard of care rather than imposing punitive actions. Home care agency staff interviewed during the review commented that their operations have improved as a result of undergoing licensing surveys by the Division. Nonetheless, during the three-year period under review, the Division denied three home care licenses, and since that time it has revoked one home care license.

A new sunset criterion, in section 24-34-104, C.R.S., questions whether the agency through its licensing or certification process imposes any disqualifications based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

By statute, a home care agency license may not be issued or renewed if an owner, applicant, or licensee has been convicted of a felony or misdemeanor involving moral turpitude or conduct that could pose a risk to the health, safety, or welfare of consumers.<sup>44</sup>

During the period under review, the Division denied one license due to the applicant's criminal history, which included prostitution. Individuals who receive home care are often vulnerable persons who are at risk of abuse and exploitation, so the standard for the operation of a home care agency must be high in order to protect these individuals from harm; therefore, the disqualification imposed by the Division serves consumer protection interests.

As authorized in section 24-34-104, C.R.S., the General Assembly may continue this program for any period between 1 and 15 years. Although the licensure of home care agencies is a new program, the licensure of healthcare facilities has been in place for many decades. The home care agency licensure program as presently structured seems to be fairly effective and efficient.

Therefore, the General Assembly should continue the regulation of home care agencies for nine years, until 2023.

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<sup>44</sup> §§ 25-27.5-108(3), C.R.S.

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**Recommendation 2 – Amend the requirement to undergo a criminal history record check to obtain a home care license to clarify which owners must undergo a criminal history record check and to require each administrator (or manager) to undergo a criminal history record check.**

Section 25-27.5-106(3), C.R.S., states:

With the submission of an application for a license granted pursuant to this article, each owner, applicant, **or** licensee shall submit a complete set of his or her fingerprints to the [Division]. The [Division] shall forward such fingerprints to the Colorado Bureau of Investigation (CBI) for the purpose of conducting a state and national fingerprint-based criminal history record check utilizing the records of the CBI and the Federal Bureau of Investigation (FBI). [Emphasis added.]

Although the criminal history record check is intended to protect the public, the use of the word “or” in the language above allows an applicant with a disqualifying background to simply switch submission of the application to another person whose record is clean. Otherwise, the Division would have cause to deny an application based on a criminal history.

Instead, a criminal history record check should be conducted on anyone who controls or influences the operations of the business. Thus, each owner should undergo a criminal history record check. However, to avoid conducting criminal record checks of every single shareholder in a company, the threshold for companies with multiple owners should be a five-percent interest for privately-held companies and a ten-percent interest in publicly-traded companies.

Moreover, the consuming public could be better protected by also requiring the home care agency administrator or manager to undergo a criminal history record check. While owners have legal control of the business, administrators manage and control the day-to-day operations of the agency.

Criminal history record checks are an important way to prevent organized crime from operating in home care. According to federal law enforcement, organized criminal groups have moved from fraudulent stock schemes in the 1990s to mortgage fraud in the last decade and now into healthcare fraud.<sup>45</sup> These groups have found Medicare and Medicaid to be more lucrative and less dangerous than traditional organized criminal activities.<sup>46</sup>

And the home care industry is no exception.

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<sup>45</sup> William K. Rashbaum, “A \$250 Million Fraud Scheme Finds a Path to Brighton Beach,” *The New York Times*, February 29, 2012.

<sup>46</sup> Merrill Matthews, “Medicare and Medicaid Fraud is Costing Taxpayers Billions,” *Forbes*, May 31, 2012.

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In 2012 alone, the Office of the Inspector General (OIG) reported the following cases of Medicare and Medicaid fraud in home health:<sup>47</sup>

- An administrator of a home care agency in Chicago, two physicians, and four registered nurses were indicted in a \$20 million Medicare fraud case;
- An owner of a home care agency in Detroit and 19 other defendants were convicted of defrauding Medicare of \$13.4 million by billing for services never rendered and money laundering;
- A doctor, five owners of home care agencies in Dallas, and five others were indicted in a \$374 million Medicare and Medicaid fraud scheme for fraudulent billing;
- Two home care agency owners in Houston and nine other nurses and patient recruiters were indicted for their roles in a \$5.2 million Medicare fraud scheme for billing for services that were unnecessary and never provided;
- Two owners and operators of a home health agency in Los Angeles were ordered to pay \$7 million in restitution for billing Medicare for services that were not necessary and never provided;
- An owner and administrator of a healthcare agency in Miami was convicted in a \$42 million Medicare fraud case for billing Medicare for unnecessary home care services;
- Three owners of a healthcare agency in Miami were convicted in a \$60 million Medicaid fraud case for billing for services that were not medically necessary and, in some cases, were not provided at all; and
- An administrator for a home care agency in Miami was convicted of conspiracy to commit fraud and was ordered to pay about \$16 million in restitution for billing Medicare for beneficiaries who had no medical need for services.

Considering the risk of Medicare and Medicaid fraud in home care and the millions of dollars of public funds at stake, criminal history record checks are fiscally responsible, and individuals who pay from private funds are also vulnerable to fraud and theft by home care agencies.

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<sup>47</sup> The Department of Health and Human Services and the Department of Justice. *Health Care Fraud and Abuse Control Program: Annual Report for Fiscal Year 2012*. February 2013.

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Therefore, the General Assembly should amend section 25-27.5-106, C.R.S., to require each owner and administrator (or manager<sup>48</sup>) of a home care agency to undergo a fingerprint-based criminal history record check through CBI and the FBI with subsequent arrest notification; provided however that criminal history record checks should only be required of owners with a five-percent interest in a privately-held company, or a ten-percent interest in a publicly-traded company.

***Recommendation 3 – Strengthen criminal history record checks of employees of home care agencies and referrals of home care placement agencies.***

In section 25-27.5-107, C.R.S., home care agencies and home care placement agencies (placement agencies) are required to perform a criminal history record check before hiring an employee or referring anyone for placement in a home.

Although the Act requires a criminal history record check to be performed, it offers no guidance as to any disqualifying crimes.

Considering the vulnerability of home care consumers, individuals should not be allowed to be employed by a home care agency or referred by a placement agency if they have been convicted of crimes such as:

- Homicide and related offenses;
- Other violent offenses;
- Sex-related offenses; and
- Offenses against dependent or vulnerable individuals.

Consumers rely on home care agencies and placement agencies to screen the individuals that are placed in their homes. Home care workers assist with health-related tasks and other tasks that are the most personal in one's life (e.g., using the toilet or bathing). Many individuals who receive home care are vulnerable to abuse or assault, and home care workers are mostly unsupervised in their day-to-day tasks. Ensuring that employees of home care agencies do not have a history of abuse, exploitation, or violent crimes is important to mitigate the risk of harm to vulnerable persons.

The home care market is expanding rapidly, the interest in opening a home care agency is high, and some people who are now opening home care agencies do not have any experience in healthcare or in working with vulnerable persons. Although many established home care agencies operate with very high hiring standards, it is clear that others do not.

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<sup>48</sup> Class A agencies typically apply the term "administrator" while Class B agencies typically apply the term "manager" for the individual in charge of the day-to-day operations of the home care agency.

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Therefore, it would be reasonable to create some standards for home care agencies as to which crimes should disqualify an individual from employment in a home care agency and for the Board of Health to establish guidelines for disqualifying crimes and other criminal convictions.

Forty states have established specific crimes that disqualify an individual from working in a home care agency.

In Colorado, a criminal background of serious offenses may disqualify an individual from working in a variety of fields, especially those that require a high level of trust. For example, the General Assembly, in section 27-90-111, C.R.S., disqualifies from employment in a facility operated by the Department of Human Services that serves vulnerable persons, such as those with mental illness and developmental disabilities, anyone with a conviction of:

- A crime of violence;
- Unlawful sexual behavior;
- Domestic violence;
- Child abuse;
- Third-degree assault; and
- Sexual assault by a psychotherapist.

Considering home care clients largely consist of vulnerable persons who are at risk of abuse and exploitation and home care workers are often unsupervised, it is reasonable to disqualify from home care employment anyone who has been convicted of a serious crime such as homicide, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals.

For other offenses, such as drug diversion, theft, and driving under the influence, the Board of Health should adopt rules to provide direction to home care agencies on elements to consider, such as the passage of time, the number of convictions, the seriousness of the offenses, and other mitigating factors.

In conclusion, the General Assembly should disqualify from being employed by a home care agency or referred by a placement agency any individual who has been convicted of, or has plead guilty or *nolo contendere* to, crimes fitting the general categories of:

- Homicide and related offenses;
- Other violent offenses;
- Sex-related offenses; and
- Offenses against dependent or vulnerable individuals.

The General Assembly should also authorize the Board of Health to adopt rules related to criminal history records involving disqualifying crimes and other offenses that may pose a risk to the health, safety, and welfare of home care consumers.

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#### **Recommendation 4 – Strengthen oversight of placement agencies.**

A placement agency is defined in the Act as<sup>49</sup>

an organization that, for a fee, provides only referrals of providers to home care consumers seeking services. A home care placement agency does not provide skilled home health services or personal care services to a home care consumer in the home care consumer's temporary or permanent home or place of residence directly or by contract.

Home care agencies are licensed. Placement agencies, on the other hand, are only required to be registered. Individual home care workers may be licensed through a professional license, through the State Board of Nursing, for example, or they may provide unskilled care and, therefore, would not hold a professional or occupational license.

Placement agencies are required by statute to:

- Notify the Division that they provide referrals for skilled home health or personal care services;<sup>50</sup>
- Provide disclosures to clients;<sup>51</sup> and
- Perform criminal history record checks before referring a home care worker.<sup>52</sup>

In a home care placement agency, the client is the employer and the home care workers are independent contractors. The placement agency simply provides the referral. In a traditional home care agency, the services are provided by the agency, which employs, trains, and supervises the home care workers.

Since a placement agency only refers home care workers for employment and does not employ them, it cannot be licensed as a home care agency.

A home care agency must test, train, and supervise its employees. Because a placement agency only refers independent contractors, a placement agency cannot. Federal and state laws prevent this. For example, according to section 8-70-115(1)(b), C.R.S., an independent contractor must be free from control and direction in the performance of the service, and the individual must be customarily engaged in the occupation related to the service performed.<sup>53</sup>

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<sup>49</sup> § 25-27.5-102(5), C.R.S.

<sup>50</sup> § 25-27.5-103(2)(a), C.R.S.

<sup>51</sup> § 25-27.5-104(1)(c), C.R.S.

<sup>52</sup> § 25-27.5-107, C.R.S.

<sup>53</sup> Colorado Department of Labor and Employment. *Workers' Compensation*. Retrieved on July 11, 2013, from <http://www.coworkforce.com/dwc/whatis/employerwhatis.asp>

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A home care placement agency provides the important service of screening the individuals that it places in consumers' homes. While the agency cannot supervise or direct the care provided, it does have control over who it refers and how it screens referrals.

The Act currently requires placement agencies to perform a criminal history record check on anyone it refers. It also requires placement agencies to disclose the responsibilities of the placement agency to clients. However, there is no way for the Division to ensure that placement agencies are fulfilling these two essential requirements. Moreover, if the Division had evidence that a placement agency was not fulfilling these two requirements, it would not have any authority to enforce them.

The registration of placement agencies is a simple list offering little consumer protection.

The criteria that guide sunset reviews question whether regulation is necessary and whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest.

While maintaining a registry of placement agencies may be the appropriate level of regulation, the Division should have the means to enforce the requirements established in statute.

The statutory requirements of registration are that placement agencies must perform criminal history record checks of referrals for home care services and provide certain specified consumer disclosures. These are necessary for consumer protection.

For this regulatory scheme to be effective, the Board of Health should be authorized to adopt rules regarding records retention, and the Division should have the authority to audit placement agencies to ensure compliance.

The Division should also have the following authorities over placement agencies:

- Removal from the registry for non-compliance; and
- Setting fees to cover the cost of regulation.

Therefore, the General Assembly should strengthen the regulation of placement agencies to allow the Division to audit placement agencies for compliance with the Act, enforce compliance with the Act, set fees, and authorize the Board of Health to promulgate rules regarding records retention.