

Dear Senators LODGE, Broadsword & Werk, and
Representatives BLOCK, Nielsen & Henbest:

The Office of the Legislative Services, Research and Legislation, has received the enclosed rules of the Dept. of Health & Welfare: IDAPA 16.05.06 - Criminal History and Background Checks (Docket No. 16-0506-0801) (Temporary and Proposed Fee).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the cochairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research and Legislation no later than fourteen (14) days after receipt of the rules' analysis from Legislative Services. The final date to call a meeting on the enclosed rules is no later than 6-27-08. If a meeting is called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules' analysis from Legislative Services. The final date to hold a meeting on the enclosed rules is 7-28-08.

_____The germane joint subcommittee may request a statement of economic impact with respect to a proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement, and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has been held.

To notify Research and Legislation, call 334-2475, or send a written request to the address or FAX number indicated on the memorandum enclosed.

MEMORANDUM

TO: Rules Review Subcommittee of the Senate Health & Welfare Committee and the House Health & Welfare Committee

FROM: Research & Legislation Staff - Paige Alan Parker

DATE: June 9, 2008

SUBJECT: Department of Health and Welfare - IDAPA 16.05.06 - Criminal History and Background Checks (Docket No. 16-0506-0801) (Temporary and Proposed Fee).

Through Docket No. 16-0506-0801, the Department of Health and Welfare is increasing the fee for a Department fingerprint-based criminal history and background check from \$48 to \$55 and seeking to add the crimes of identity theft and attempted strangulation to its list of convicted criminal activity which requires the Department to issue an unconditional denial if the conviction occurred within five years.

According to the Department, the temporary and proposed fee rule is authorized by section 56-1004A, Idaho Code.

Section 56-1004A, Idaho Code, enacted in 2005 and amended in 2006, specifically deals with criminal history and background checks. Under the provisions of that section, the legislature authorizes the Department “to conduct criminal history and background checks of individuals who provide care or services to vulnerable adults or children and are identified in rule as being required to have a criminal history and background check.” Section 56-1004A(1), Idaho Code. The Department is specifically required to promulgate rules “to further define those individuals who are required to have a background check,” section 56-1004A(3), Idaho Code, to define the time frame for submitting the application, *ibid*, and to “determine which crimes disqualify the applicant and for what period of time,” section 56-1004A(4), Idaho Code. The section anticipates that fingerprinting will be part of the criminal history and background check process. Section 56-1004A(3), Idaho Code. The applicant is responsible for the cost of the background check. Section 56-1004A(5), Idaho Code.

The Governor's justification for the temporary rule is the protection of the public health, safety or welfare and to comply with governing law under section 56-1004A, Idaho Code. In compliance with section 67-5226(2), Idaho Code, the Governor has found that the fee increase is necessary to avoid immediate danger. The temporary rule goes into effect on July 1, 2008.

According to the Department, statute requires an applicant to pay a fee for a criminal history check, the amount of which is being increased from \$48 to \$55 under the temporary and proposed rule. This fee was last increased from \$45 to \$48 effective October 1, 2007. The Department anticipates that this fee increase will prevent an increase in the state general fund cost by approximately \$67,600 for fiscal year 2009. The Department states that negotiated rulemaking was not conducted because the rule is necessary to protect the public health, safety or welfare and to comply with governing law.

Public hearings will be held if requested in writing by 25 persons, a political subdivision or an agency not later than July 16, 2008. All written comments must be directed to the Department on or before July 23, 2008.

ANALYSIS

Besides increasing the criminal history and background check fee by \$7, the temporary and proposed fee rule adds sections 18-923, 18-3126 and 28-51-101 through 28-51-107, Idaho Code, to the list of offenses which require the Department to issue an unconditional denial for an individual who has been convicted of the offense for 5 years from the date of the conviction.

Section 18-923, dealing with attempted strangulation of a household member or a person with whom the defendant has or had a dating relationship, was added to the Idaho Code in 2005. The crime is a felony. No injuries are required to prove attempted strangulation. The prosecution is not required to show that the defendant intended to kill or injure the victim.

Section 18-3126, Idaho Code, has been on the books since 1999 and makes it a crime for any person to obtain or record personal identifying information of another person without the authorization of that person, with the intent that the information be used to obtain or attempt to obtain credit, money, goods or services in the name of the other person without the consent of that person.

Sections 28-51-101 and 28-51-102, Idaho Code, dealing with blocking of information by a credit reporting agency where there has been a theft of personal identity, were repealed in 2008 by Senate Bill 1380 and replaced with new sections 28-52-101 through 28-52-109, Idaho Code, the Credit Report Protection Act. Section 28-51-103, which remains good law, does not deal with identity theft but creates a civil penalty for failure of a merchant to limit the payment card digits printed on a sale receipt to five numbers. Sections 28-51-104 through 28-51-107, Idaho Code, are also good law but do not create criminal liability. Instead, these sections provide civil remedies for failure of an agency individual or commercial entity to provide prompt notice of a breach of security of a computerized database containing personal information.

The Department is addressing these issues and is expected to delete the references to section 28-51-101 through 28-51-107, Idaho Code.

SUMMARY

The Department's temporary and proposed fee rule appears to be authorized by and is consistent with section 56-1004A, Idaho Code.

cc: Sherri Kovach, Program Supervisor, Department of Health and Welfare - Administrative Procedures Section;
Steve Bellomy, Department of Health and Welfare

IDAPA 16 - DEPARTMENT OF HEALTH AND WELFARE

16.05.06. - CRIMINAL HISTORY AND BACKGROUND CHECKS

DOCKET NO. 16-0506-0801 (FEE RULE)

NOTICE OF RULEMAKING - TEMPORARY AND PROPOSED RULE

EFFECTIVE DATE: The effective date of the temporary rule is July 1, 2008.

AUTHORITY: In compliance with Sections 67-5221(1) and 67-5226, Idaho Code, notice is hereby given that this agency has adopted a temporary rule, and proposed rulemaking procedures have been initiated. The action is authorized pursuant to Section 56-1004A, Idaho Code.

PUBLIC HEARING SCHEDULE: Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than July 16, 2008.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

DESCRIPTIVE SUMMARY: The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule and a nontechnical explanation of the substance and purpose of the proposed rulemaking:

The Department conducts criminal history and background checks. The actual cost to complete these checks is the responsibility of the applicant, under Section 56-1004A(5), Idaho Code. The Department is increasing the fee amount for a criminal history and background check to cover current costs in compliance with statute. These rules are also being amended to add two additional 5-year disqualifying crimes to better protect vulnerable adults and children.

TEMPORARY RULE JUSTIFICATION: Pursuant to Section 67-5226(1)(a), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate for the following reasons:

These rules are necessary to protect the public health, safety, or welfare, and to comply with governing law under Section 56-1004A, Idaho Code.

FEE SUMMARY: Pursuant to Section 67-5226(2), the Governor has found that the fee or charge being imposed or increased is justified and necessary to avoid immediate danger and the fee is described herein:

The fee amount for providing criminal history and background checks is based on costs incurred to complete these checks. This temporary fee rule increases the fee an applicant must pay to cover current costs.

FISCAL IMPACT: The following is a specific description, if applicable, of any fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year:

The fiscal impact of this change will prevent an increase in the state general fund costs by approximately \$67,600 for fiscal year 2009. Any shortfall the Department incurs from providing criminal history and background checks would need to be paid by general fund money. An analysis of the Department's costs shows that, based on the current volume, the fee needs to be increased to \$55.00 per criminal history check.

NEGOTIATED RULEMAKING: Pursuant to IDAPA 04.11.01.811, negotiated rulemaking was not conducted because this rule change is necessary to protect the public health, safety, or welfare, and to comply with governing law.

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning the temporary and proposed rule, contact Steve Bellomy (208) 334-0609.

Anyone may submit written comments regarding the proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before July 23, 2008.

DATED this 30th day of May, 2008.

Sherri Kovach
Program Supervisor
DHW - Administrative Procedures Section
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THE FOLLOWING IS THE TEXT OF DOCKET NO. 16-0506-0801

050. FEES AND COSTS FOR CRIMINAL HISTORY AND BACKGROUND CHECKS.

The fee for a Department fingerprint-based criminal history and background check is ~~forty-eight dollars (\$48)~~ fifty-five dollars (\$55) for an individual. The applicant is responsible for the cost of the criminal history and background check except where otherwise provided by Department rules. ~~(3-26-08)~~(7-1-08)T

(BREAK IN CONTINUITY OF SECTIONS)

210. DISQUALIFYING CRIMES RESULTING IN AN UNCONDITIONAL DENIAL.

An individual is not available to provide direct care or services when the individual discloses or the criminal history and background check reveals a conviction for a disqualifying crime on his record as described in Subsections 210.01 and 210.02 of this rule. (3-26-08)

01. Disqualifying Crimes. The disqualifying crimes described in Subsections 210.01.a through 210.01.v. of these rules will result in an unconditional denial being issued. (3-26-08)

- a.** Abuse, neglect, or exploitation of a vulnerable adult, as defined in Section 18-1505, Idaho Code; (3-26-08)
- b.** Aggravated, first-degree and second-degree arson, as defined in Sections 18-801 through 18-803, and 18-805, Idaho Code; (3-26-08)
- c.** Crimes against nature, as defined in Section 18-6605, Idaho Code; (3-26-08)
- d.** Forcible sexual penetration by use of a foreign object, as defined in Section 18-6608, Idaho Code; (3-26-08)
- e.** Incest, as defined in Section 18-6602, Idaho Code; (3-26-08)
- f.** Injury to a child, felony or misdemeanor, as defined in Section 18-1501, Idaho Code; (3-26-08)
- g.** Kidnapping, as defined in Sections 18-4501 through 18-4503, Idaho Code; (3-26-08)
- h.** Lewd conduct with a minor, as defined in Section 18-1508, Idaho Code; (3-26-08)

- i.** Mayhem, as defined in Section 18-5001, Idaho Code; (3-26-08)
 - j.** Murder in any degree, voluntary manslaughter, assault, or battery with intent to commit a serious felony, as defined in Sections 18-4001, 18-4003, 18-4006, and 18-4015, Idaho Code; (3-26-08)
 - k.** Poisoning, as defined in Sections 18-4014 and 18-5501, Idaho Code; (3-26-08)
 - l.** Possession of sexually exploitative material, as defined in Section 18-1507A, Idaho Code; (3-26-08)
 - m.** Rape, as defined in Section 18-6101, Idaho Code; (3-26-08)
 - n.** Robbery, as defined in Section 18-6501, Idaho Code; (3-26-08)
 - o.** Felony stalking, as defined in Section 18-7905, Idaho Code; (3-26-08)
 - p.** Sale or barter of a child, as defined in Section 18-1511, Idaho Code; (3-26-08)
 - q.** Sexual abuse or exploitation of a child, as defined in Sections 18-1506 and 18-1507, Idaho Code; (3-26-08)
 - r.** Video voyeurism, as defined in Section 18-6609, Idaho Code; (3-26-08)
 - s.** Enticing of children, as defined in Sections 18-1509 and 18-1509A, Idaho Code; (3-26-08)
 - t.** Inducing individuals under eighteen (18) years of age into prostitution or patronizing a prostitute, as defined in Sections 18-5609 and 18-5611, Idaho Code; (3-26-08)
 - u.** Any felony punishable by death or life imprisonment; or (3-26-08)
 - v.** Attempt, conspiracy, or accessory after the fact, as defined in Sections 18-205, 18-306, and 18-1701, Idaho Code, to commit any of the disqualifying designated crimes. (3-26-08)
- 02. Disqualifying Five-Year Crimes.** The Department will issue an unconditional denial for an individual who has been convicted of the following crimes for five (5) years from the date of the conviction for the crimes listed in Subsections 210.02.a. through 210.02.l. of this rule: (3-26-08)
- a.** Aggravated assault, as defined in Section 18-905, Idaho Code; (3-26-08)
 - b.** Aggravated battery, as defined in Section 18-907(1), Idaho Code; (3-26-08)
 - c.** Arson in the third degree, as defined in Section 18-804, Idaho Code; (3-26-08)
 - d.** Burglary, as defined in Section 18-1401, Idaho Code; (3-26-08)
 - e.** A felony involving a controlled substance; (3-26-08)
 - f.** Felony theft, as defined in Section 18-2403, Idaho Code; (3-26-08)
 - g.** Forgery of and fraudulent use of a financial transaction card, as defined in Sections 18-3123 and 18-3124, Idaho Code; (3-26-08)
 - h.** Forgery and counterfeiting, as defined in Sections 18-3601 through 18-3620, Idaho Code; (3-26-08)
 - i.** Grand theft, as defined in Section 18-2407(1), Idaho Code; (3-26-08)

- i.** Identity theft, as defined in Sections 18-3126, and 28-51-101 through 28-51-107, Idaho Code; (7-1-08)T
 - j.** Insurance fraud, as defined in Sections 41-293 and 41-294, Idaho Code; (3-26-08)
 - k.** Public assistance fraud, as defined in Sections 56-227 and 56-227A, Idaho Code; ~~or~~ (3-26-08)(7-1-08)T
 - m.** Attempted strangulation, as defined in Section 18-0923, Idaho Code; or (7-1-08)T
 - n.** Attempt, conspiracy, accessory after the fact, or aiding and abetting, as defined in Sections 18-205, 18-306, and 18-1701, Idaho Code, to commit any of the disqualifying five (5) year crimes. (3-26-08)
- 03. Underlying Facts and Circumstances.** The Department may consider the underlying facts and circumstances of felony or misdemeanor conduct including a guilty plea or admission in determining whether or not to issue a clearance, regardless of whether or not the individual received one (1) of the following: (3-26-08)
- a.** A withheld judgment; (3-26-08)
 - b.** A dismissal, suspension, deferral, commutation, or a plea agreement where probation or restitution was or was not required; (3-26-08)
 - c.** An order according to Section 19-2604, Idaho Code, or other equivalent state law; or (3-26-08)
 - d.** A sealed record. (3-26-08)