



Are You Obeying Child Protection Laws?

If not, you run the risk of devastating lawsuits.



I'm a board member for a nonprofit involved in educating pre-school children with developmental disabilities. I would like information on the National Child Protection Act of 1993 (which became enforceable at the end of 1995). How can we make sure we are complying with the law? How can we reduce our potential liability?

A The National Child Protection Act of 1993 (the "Act") was signed into law on December 20, 1993. The Act establishes a national database of state-reported child-abuse crime information. Anyone working with children can use this database to run background checks on employees or applicants for employment. The Act accomplishes this in several ways.

First, Section 2 of the Act requires each state to report child-abuse crime information to a national background-check system. The U.S. Department of Justice administers this system.

Second, Section 3 of the Act authorizes states to require that entities—whether public, private, for-profit, not-for-profit, or voluntary—that provide child care or child-care placement services obtain a nationwide background check of employees, volunteers, and potential employees or volunteers. This screening reveals whether these individuals have been convicted of crimes that bear upon their "fitness to have responsibility for the safety and well-being of children."

The Act states that a child-care provider is not liable for damages solely for failure to conduct a criminal background check. However, omitting such a check could be seen by a judge or jury as lack of appropriate care. Thus, neglecting

to run a background check increases your risk of legal liability.

To conduct a background check through the national database, follow these steps:

1. Create a form for individuals (employees or potential employees, paid and unpaid) to sign. The form should make clear that your organization may request a background check. It should also explain that you may choose to deny individuals unsupervised access to a child to whom you provide child care.
2. Have individuals sign your form, stating that they understand its terms. Also have them sign a statement acknowledging any criminal records they may have (unless your state laws don't allow you to do so. Some states prohibit or limit employers from inquiring into an employee's or applicant's criminal record; consult an attorney familiar with your state laws to determine whether—and if so, how—you may properly ask this question.)
3. Send the above forms to your official state agency (usually the state Attorney General's Office) along with any other information your state requires. For example, some states ask that you include a set of

fingerprints for each employee or applicant for whom you seek a background check.

4. After receiving the above information from you, your state agency must conduct the background check. This check will tell whether individuals have been convicted of, or are under pending indictment for, any crimes that affect their suitability to work with children. The state agency must provide this information to you, charging you only for the actual cost of the background check.

The Act is just one example of this country's increased awareness of, and response to, child abuse. In fact, the most significant legal actions have taken place at the state rather than federal level. Thus, all 50 states and the District of Columbia now have laws requiring certain people (such as health care providers, counselors, social workers, law enforcement officers, teachers, and others who may have contact with children in a professional capacity) to report to state child-protection authorities a reasonable suspicion that a child is abused or neglected. In most states, if these people fail to report such suspicions, they may be subject to criminal legal sanction,

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including fines or imprisonment. (Failure to report may also increase a person's potential *civil* liability for monetary damages to abuse victims. Whether it does so depends on state laws and the particular judge and jury who decide the civil case.)

Most state laws authorize, but do not require, other people to report actual or suspected abuse. In addition, most states provide immunity from civil and criminal liability to people who make reports in good faith. Many states also *require* certain categories of child-care providers to conduct background checks on employees and applicants for jobs involving access to children.

The laws on reporting child abuse and conducting background checks—especially concerning who is required to report abuse and conduct background checks—vary from state to state. Therefore, it is essential that anyone working with children obtain the advice of an attorney familiar with both state and federal child-abuse laws.

Your state's reporting laws will usually have a much greater impact on your legal obligations and liabilities than will the federal Child Protection Act. Consider the laws unique to your state as you ask yourself these questions:

1. Are you a "mandatory reporter" or a "permissive reporter"? Most states divide people into these two categories. "Mandatory reporters" are people (such as health care providers, counselors, teachers, social workers, and law enforcement officials) who are legally *required* to report actual or reasonably suspected child abuse to state authorities. "Permissive reporters" are legally *authorized* to report actual or reasonably suspected child abuse but are not legally required to do so. (In a few states, however, all people are required to report actual or suspected child abuse, with those who are normally considered "mandatory reporters" subject to an even higher level of obligation.)

2. Does the information in this instance fall within the statutory def-

The state can charge you only for the actual cost of the background check.

inition of "child abuse or neglect" in your state? Although there is a common core of conduct (such as intercourse or sodomy being sexual abuse of a child) that is considered "child abuse" in virtually all states, the precise definition of "child abuse" varies from state to state.

3. Is your information sufficient to trigger the statutory reporting requirement? Most state reporting laws apply only to *actual or reasonably suspected* child abuse rather than to any suspicion of abuse whatsoever. If you make a good-faith report, you will likely be granted immunity from liability—but only if you have a *reasonable* suspicion that abuse has occurred. If your suspicion isn't based on reliable or significant information, you may be legally liable. Thus, you would be wise to learn as much as you can about how to recognize abuse. Check with reliable sources (such as your local child protective services department) to obtain information and training on common signs of child abuse.

4. Even if you would otherwise be required to make a report, do you fall within an exemption from your state child-abuse reporting requirements? Most states have legal "privileges" that allow some people to keep information confidential even when a legal reporting obligation would otherwise apply. Examples include the clergy-penitent privilege (particularly for state-

ments made in a confessional setting), the psychotherapist-patient or counselor-counselee privilege, the physician-patient privilege, and the attorney-client privilege. Some states recognize one or more of these privileges as exceptions to the reporting requirements. Other state laws specify that these privileges do *not* apply to child-abuse reporting. (Also note that if you work with children in a religious context, you may be exempt from your state reporting requirements. You could base such an argument on religious freedom. The First Amendment and the Religious Freedom Restoration Act have religious-freedom provisions. Your state constitution may have such provisions, too.)

5. What is the potential penalty for not reporting? In most states, people defined as "mandatory reporters" are subject to a fine and/or imprisonment for failing to make a required report. People who are "permissive reporters" don't usually face such penalties.

6. Will you be protected from civil and criminal liability for making a report in good faith? Most states grant limited immunity from criminal and civil liability to people who in good faith report actual or reasonably suspected child abuse. You should consider the impact of such laws in assessing your legal liability risks for child-abuse reporting.

For more information, order Nonprofit Alert Memo *Preventing and Responding to Child Abuse and Child Abuse Reporting: A Fifty State Survey*, available for \$20 from Gammon & Grange at the below address. See also "Background Check Law Extended," *Nonprofit World*, March-April 1995, page 7.

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Nonprofit World • Volume 15, Number 6 November/December 1997
Published by the Society for Nonprofit Organizations
6314 Odana Road, Suite 1, Madison, WI 53719 • (800) 424-7367