

## D.C. OFFICE OF PERSONNEL

## NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000; Mayor's Order 2005-73, dated May 5, 2005; Title II of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("D.C. Law 15-353"), effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code 4-1501.01 *et seq.*) (2005 Supp.), amended on an emergency basis by section 204 of Title II of the Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 ("Act"), effective October 18, 2006 (D.C. Act 16-490); and any similar succeeding legislation, hereby gives notice of the adoption of the following emergency rules. The Act amended section 205 (c)(5) of D.C. Law 15-353 to modify the language concerning the signed affirmation that must be completed by applicants subject to a criminal background check before the check is conducted; modify some of the felony offenses listed in that section; and delete other felony offenses previously listed. Further, the Act added a new section 205a to D.C. Law 15-353 on the *assessment of information obtained from criminal background checks*. The new section provides that the information obtained from a criminal background check shall not create a disqualification or presumption against employment or volunteer status of an applicant unless the Mayor determines that the applicant poses a present danger to children or youth; lists the factors that shall be considered in making such a determination; and provides that applicants have a right to appeal a denial of employment or volunteer status based on a finding that they pose a present danger to children or youth to the Commission on Human Rights. Because D.C. Law 15-353 requires that rules be issued to implement the provisions of the title, and to ensure the preservation of the welfare of the public in general and the welfare of children and youth in particular, action was taken on November 3, 2006 to supersede the Notice of Emergency and Proposed Rulemaking published in the *D.C. Register* at 53 DCR 7276 (September 1, 2006), and adopt the following rules on an emergency basis effective November 3, 2006. In order to implement the provisions of the Act, sections 412.1, 412.21, 412.23 through 412.26, 412.28, 412.31, and 412.35 of Chapter 4, Organization for Personnel Management, of Title 6 of the District of Columbia Municipal Regulations (DCMR), were amended. In addition to the changes necessitated to implement the provisions of the Act, the following changes were made to sections 412, 405, 407, and 499 of the chapter: sections 412.2 and 412.3 were amended; sections 412.4 (d) and 412.4 (e) were amended to clarify which components of the Fire and Emergency Medical Services Department and the Metropolitan Police Department (MPD), respectively, shall be considered covered child or youth services providers under D.C. Law 15-353; a new section 412.4 (h) was added listing the Department of Employment Services as one of the subordinate agencies considered covered child or youth services provider; sections 412.4 (h) and 412.4 (i) were renumbered as 412.4 (i) and 412.4 (j), respectively; a new section 412.4 (k) was added to provide that, in addition to the agencies listed in section 412.4 (a) through (j), any other subordinate agency which as a result of a permanent or temporary change to its mission such as may be caused by a reorganization, or any other similar reason, shall become a covered child or youth services provider subject to the criminal background check and traffic record check provisions in the Act; sections 412.6 and 412.7 were amended to add the pertinent citations to the D.C. Official Code; sections 412.8

and 412.9 were amended; section 412.11 was amended to add a reference to D.C. Law 15-353 and the pertinent citation to the D.C. Official Code, and a new subsection 412.11 (e) to provide that any employee of a District government agency who volunteers as a host of a child or youth participating in the Summer Youth Employment Program within his or her agency shall be considered a volunteer for the purposes of the Act and shall be subjected to criminal background checks; section 412.12 was amended to add the pertinent citations to the D.C. Official Code, and a subsection stating that criminal background checks shall not be required for sworn members of the MPD who meet the criteria under the Act; a new section 412.13 (t), "youth employment services," was added to the list of duties and responsibilities in section 412.13 used to identify and determine which positions shall be covered under the Act; and section 412.13 (t) was renumbered as 412.13 (u); section 412.19 was amended to add the pertinent citation to the D.C. Official Code, and provide that a personnel authority may determine that it is not feasible or appropriate to allow an appointee to begin working prior to receiving the results of a criminal background check or traffic check; sections 412.20, 412.29, and 412.30 were amended; section 412.36 was amended to add provisions for a 2-year periodic criminal background check, completion of an annual signed affirmation, and a self-disclosure requirement; a new section 412.37 was added describing instances under which a criminal background check shall be conducted in addition to the 2-year periodic check; section 412.37 was renumbered as 412.38 and amended; a new section 412.39 was added to provide that, with some noted exceptions, in addition to or in place of administrative action, an employee who fails a periodic check may be reassigned to a non-covered position; section 412.38 was renumbered as 412.40 and amended; sections 412.39 and 412.40 were renumbered as 412.41 and 412.42, respectively; sections 412.41 through 412.43 were renumbered as 412.43 through 412.45, respectively, and amended; section 405.5, on suitability checks and background investigations was amended; sections 407.1 through 407.3, 407.5, 407.6, and 407.8, all concerning suitability actions initiated by personnel authorities, were amended to expand on the circumstances under which a personnel authority may take such actions; and the definition of the term "volunteer" in section 499 of the chapter was amended. These emergency rules will remain in effect for up to one hundred twenty (120) days from November 3, 2006 unless earlier superseded by another rulemaking notice.

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The Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000; Mayor's Order 2005-73, dated May 5, 2005; D.C. Law 15-353, as amended on an emergency basis by the Act; and any similar succeeding legislation, hereby gives notice of the intent to adopt the following rules in no less than thirty (30) days from the publication of this notice in the *D.C. Register*. The Act amended section 205 (c)(5) of D.C. Law 15-353, to modify the language concerning the signed affirmation that must be completed by applicants subject to a criminal background check before the check is conducted; modify some of the felony offenses listed in that section; and delete other felony offenses previously listed. Further, the Act added a new section 205a to D.C. Law 15-353 on the *assessment of information obtained from criminal background checks*. The new section provides that the information obtained from a criminal background check shall not create a disqualification or presumption against employment or volunteer status of an applicant unless the Mayor determines that the applicant poses a present danger to children or youth; lists the factors that shall be considered in making such a

determination; and provides that applicants have a right to appeal a denial of employment or volunteer status based on a finding that they pose a present danger to children or youth to the Commission on Human Rights. The purpose of these rules is to implement the provisions of the Act by amending sections 412.1, 412.21, 412.23 through 412.26, 412.28, 412.31, and 412.35 were amended of Chapter 4, Organization for Personnel Management, of Title 6 of the DCMR. In addition to the changes necessitated to implement the provisions of the Act, the following changes were made to sections 412, 405, 407, and 499 of the chapter: sections 412.2 and 412.3 were amended; sections 412.4 (d) and 412.4 (e) were amended to clarify which components of the Fire and Emergency Medical Services Department and the Metropolitan Police Department (MPD), respectively, shall be considered covered child or youth services providers under D.C. Law 15-353; a new section 412.4 (h) was added listing the Department of Employment Services as one of the subordinate agencies considered covered child or youth services provider; sections 412.4 (h) and 412.4 (i) were renumbered as 412.4 (i) and 412.4 (j), respectively; a new section 412.4 (k) was added to provide that, in addition to the agencies listed in section 412.4 (a) through (j), any other subordinate agency which as a result of a permanent or temporary change to its mission such as may be caused by a reorganization, or any other similar reason, shall become a covered child or youth services provider subject to the criminal background check and traffic record check provisions in the Act; sections 412.6 and 412.7 were amended to add the pertinent citations to the D.C. Official Code; sections 412.8 and 412.9 were amended; section 412.11 was amended to add a reference to D.C. Law 15-353 and the pertinent citation to the D.C. Official Code, and a new subsection 412.11 (e) to provide that any employee of a District government agency who volunteers as a host of a child or youth participating in the Summer Youth Employment Program within his or her agency shall be considered a volunteer for the purposes of the Act and shall be subjected to criminal background checks; section 412.12 was amended to add the pertinent citations to the D.C. Official Code, and a subsection stating that criminal background checks shall not be required for sworn members of the MPD who meet the criteria under the Act; a new section 412.13 (t), "youth employment services," was added to the list of duties and responsibilities in section 412.13 used to identify and determine which positions shall be covered under the Act; and section 412.13 (t) was renumbered as 412.13 (u); section 412.19 was amended to add the pertinent citation to the D.C. Official Code, and provide that a personnel authority may determine that it is not feasible or appropriate to allow an appointee to begin working prior to receiving the results of a criminal background check or traffic check; sections 412.20, 412.29, and 412.30 were amended; section 412.36 was amended to add provisions for a 2-year periodic criminal background check, completion of an annual signed affirmation, and a self-disclosure requirement; a new section 412.37 was added describing instances under which a criminal background check shall be conducted in addition to the 2-year periodic check; section 412.37 was renumbered as 412.38 and amended; a new section 412.39 was added to provide that, with some noted exceptions, in addition to or in place of administrative action, an employee who fails a periodic check may be reassigned to a non-covered position; section 412.38 was renumbered as 412.40 and amended; sections 412.39 and 412.40 were renumbered as 412.41 and 412.42, respectively; sections 412.41 through 412.43 were renumbered as 412.43 through 412.45, respectively, and amended; section 405.5, on suitability checks and background investigations was amended; sections 407.1 through 407.3, 407.5, 407.6, and 407.8, all concerning suitability actions initiated by personnel authorities, were amended to

expand on the circumstances under which a personnel authority may take such actions; and the definition of the term "volunteer" in section 499 of the chapter was amended. Upon adoption, these rules will amend Chapter 4, Organization for Personnel Management, of Title 6 of the DCMR, published at 32 DCR 75 (January 4, 1985) and amended at 33 DCR 4447 (July 25, 1986), 51 DCR 928 (January 23, 2004), 51 DCR 11591 (December 24, 2004), and 52 DCR 6646 (July 15, 2005).

## CHAPTER 4

### ORGANIZATION FOR PERSONNEL MANAGEMENT

*Chapter 4 of the D.C. Personnel Regulations is amended as follows:*

*Section 405.5 is amended to read as follows:*

- 405.5 ~~Unless otherwise provided by law or regulation, in filling a position subject to~~ background investigation, the investigation need not be conducted if the appointee is already employed with the District government, the prior District government position that he or she held was subject to one, and the nature of the personnel action for the new appointment is one (1) of the following:
- (a) Promotion;
  - (b) Demotion;
  - (c) Reassignment; or
  - (d) Appointment, or conversion to an appointment made by a District government agency of an employee of that agency who has been serving continuously with that agency for at least one (1) year in one (1) or more positions under an appointment subject to investigation.

*Section 407 is amended as follows:*

#### 407 SUITABILITY ACTIONS INITIATED BY PERSONNEL AUTHORITIES

*Sections 407.1 through 407.3 are amended to read as follows:*

- 407.1 Personnel authorities may take suitability action against a District government employee pursuant to this section when:
- (a) The personnel authority makes a determination that an employee was involved in a material, intentional false statement or deception or fraud in his or her examination or appointment with the District government, or in the falsification of official personnel records;

- (b) Derogatory information about the employee, of a nature that constitutes an immediate hazard to the agency, the employee concerned, to other employees, or to the detriment of the public health, safety, or welfare, is disclosed by credible source or independently discovered by the personnel authority or employing agency; or
- (c) Derogatory information about an employee, of a nature that will impact the employee's suitability to continue performing the duties of his or her position, is disclosed by credible source or independently discovered by the personnel authority or employing agency.

407.2 In either of the circumstances described in section 407.1 of this section, the personnel authority shall:

- (a) Require that the employing agency remove the employee from District government service;
- ~~(b) Require that the employing agency remove the employee from District government service; and cancel any reinstatement eligibility, as applicable; or~~
- (c) In addition to the actions specified in section 407.2 (b) of this section, deny the employee examination for and appointment to, a position in the agency for a period of not more than three (3) years from the date of the determination of unsuitability.

407.3 In the event that a determination is made that the suitability violation does not rise to the standard of a material, intentional false statement or deception or fraud in examination or appointment described in section 407.1 (a) of this section, the personnel authority may require that the employing agency take an administrative action against the employee that is less than removal.

407.4 The appropriate personnel authority shall determine the specific duration of any period of debarment imposed under section 407.2 (c) of this section.

*Sections 407.5 and 407.6 are amended to read as follows:*

407.5 Subordinate agencies shall refer any case with circumstances as described in section 407.1 of this section to the Director, D.C. Office of Personnel.

407.6 The appropriate personnel authority shall ensure that any suitability action taken against an employee pursuant to this section is based on information or documentation that is accurate, timely, relevant, and complete.

407.7 Before taking any of the actions listed in sections 407.2 and 407.3 of this section, the employee shall be given an opportunity to explain the derogatory information, in writing, within fifteen (15) days of being notified thereof, to allow the appointee to provide information that would explain any discrepancies, omissions, or

misinformation, or mitigating circumstances that may exist which are unknown to the personnel authority.

*Section 407.8 is amended to read as follows:*

407.8 The Mayor (or his or her designee) shall take suitability disqualification action in the case of a subordinate agency head.

*Section 412 is amended as follows:*

**412 CRIMINAL BACKGROUND CHECK AND TRAFFIC RECORD CHECK REQUIREMENTS – DISTRICT GOVERNMENT AGENCIES CONSIDERED CHILD OR YOUTH SERVICES PROVIDERS**

*Section 412.1 is amended to read as follows:*

412.1 Pursuant to Title II of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004, effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code § 4-1501.01 *et seq.*) (2005 Supp.), as amended on an emergency basis by section 204 of Title II of the Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006, effective October 18, 2006 (D.C. Act 16-490), and any similar succeeding legislation (jointly referred to as “the Act”), and as specified in this section, the Mayor and other personnel authorities subject to these regulations shall be required to conduct criminal background checks and traffic record checks to investigate certain employees, volunteers, and persons being considered for employment with District government agencies that are “covered child or youth services providers,” as that term is defined in section 202 (3) of the Act (D.C. Official Code § 4-1501.02 (3)) (2005 Supp.) and section 499 of this chapter.

*Section 412.2 is amended to read as follows:*

- 412.2 (a) Pursuant to section 211 (1) of the Act (D.C. Official Code § 4-1501.11 (1)) (2005 Supp.), District government agencies considered covered child or youth services providers shall begin conducting criminal background checks within forty-five (45) days of the publication in the D.C. Register of the notice of final rulemaking implementing the criminal background check requirements of the Act.
- (b) In addition to the requirement in section 412.16 of this section to include statements on vacancy announcements informing applicants that a position has been identified and designated as requiring a criminal background check or traffic record check, or both, the personnel authority shall notify each employee occupying a covered position that he or she shall be subjected to a criminal background check or traffic record check, or both, prior to conducting any check pursuant to the Act or this section.

- (c) The requirement for the criminal background checks shall apply not only to new appointees to paid and voluntary positions covered under the Act, but also to employees occupying positions covered under the Act. Such employees will be subjected to an initial criminal background check within the timeframe specified in this subsection and, subsequent to that, to periodic checks.

*Section 412.3 is amended to read as follows:*

- 412.3 Pursuant to section 203 (g) of the Act D.C. Official Code § 4-1501.03 (g) (2005 Supp.), each employee or volunteer described in section 412.11 (c) and (d) of this section occupying a covered position shall be required to submit to periodic criminal background checks while employed by, or volunteering at, a District government agency considered a covered child or youth services provider. The provisions for periodic criminal background checks are specified in sections 412.36 through 412.40 of this section.

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*Sections 412.4 (d) and (e) are amended to read as follows; a new section 412.4 (h) is added; sections 412.4 (h) and 412.4 (i) are renumbered as 412.4 (i) and 412.4 (j), respectively; and a new section 412.4 (k) is added:*

- 412.4 The following subordinate agencies shall be considered covered child or youth services providers subject to the criminal background check and traffic record check provisions of the Act. The standard for determining that an agency is subject to the Act is that as part of its mission, the agency, as a whole or certain components thereof, provides the types of direct services to children or youth, or for the benefit of children or youth, encompassed in the duties and responsibilities listed in section 412.13 of this section:
- (a) Department of Human Services;
  - (b) Department of Health;
  - (c) Department of Parks and Recreation;
  - (d) Fire Prevention Bureau (FPB) within the Fire and Emergency Medical Services Department (FEMSD), provided that the primary duties of any position designated as subject to the Act within the FPB shall require direct contact with children or youth, and the incumbent of the position would not otherwise be subject to a criminal background check or traffic record check in accordance with existing policies and practices for the FEMSD;
  - (e) Youth Investigations Branch; Youth Violence Prevention Section; Office of Community Policing, Community Partnership Branch; and the Office of Human Services within the Metropolitan Police Department (MPD);
  - (f) State Education Office within the Executive Office of the Mayor;

- (g) Department of Youth Rehabilitation Services;
- (h) Department of Employment Services;
- (i) Department of Mental Health;
- (j) Child and Family Services Agency; and
- (k) Any other subordinate agency which, as a result of a permanent or temporary change to its mission such as may be caused by reorganization or any other similar reason shall become a covered child or youth services provider subject to the criminal background check and traffic record check provisions in the Act.

412.5 A District government agency designated by the Mayor or independent personnel authority as a child or youth services provider subject to the Act, may challenge such a designation and the requirement to comply with the Act, by submitting a challenge of the designation, in writing, to the appropriate personnel authority, within five (5) days of the publication in the D.C. Register of the notice of final rulemaking implementing the criminal background check requirements of the Act. The submission shall include information and documentation deemed appropriate by the agency to challenge the designation. The personnel authority will evaluate the information and documentation submitted by the agency and respond in writing within five (5) days of the receipt of the agency's challenge.

412.6 Pursuant to section 204 (b)(2) of the Act (D.C. Official Code § 4-1501.04 (b)(2)) (2005 Supp.), traffic record checks shall be conducted on employees and supervised and unsupervised volunteers of District government agencies considered covered child or youth services providers who are, or on appointees who would be, required to drive motor vehicles to transport children or youth in the course of performing their duties. Traffic record checks shall be obtained from the traffic records maintained by the D.C. Department of Motor Vehicles.

412.7 Pursuant to section 205 (a) and (b) of the Act (D.C. Official Code § 4-1501.05 (a) and (b)) (2005 Supp.), criminal background checks will be conducted in accordance with Federal Bureau of Investigations (FBI) policies and procedures and in a FBI-approved environment, by means of fingerprint and National Criminal Information Center checks.

*Section 412.8 is amended to read as follows:*

412.8 Agencies subordinate to the Mayor and independent District government agencies that are subject to the Act, shall cover the costs for criminal background checks and traffic record checks required under the Act.

412.9 The Director, D.C. Office of Personnel, shall enter into a Memorandum of Understanding (MOU) with the Chief, MPD, stating that the MPD will conduct the

criminal background checks under the Act, including fingerprinting, and develop internal operating procedures to conduct the checks, for agencies under the personnel authority of the Mayor.

- 412.10 Personnel authorities shall be responsible for conducting traffic record checks pursuant to the Act, and for developing internal operating procedures for conducting the checks.

*Section 412.11 is amended to read as follows:*

- 412.11 Pursuant to section 203 (a) of the Act (D.C. Official Code § 4-1501.03 (a)) (2005 Supp.), criminal background checks shall be required for the following persons:
- (a) Each person being considered for paid employment with a District government agency considered a covered child or youth services provider, in a position with duties and responsibilities as described in section 412.13 of this section or similar duties and responsibilities;
  - (b) Each person being considered for voluntary service in a District government agency considered a covered child or youth services provider, in an unsupervised position with duties and responsibilities as described in section 412.13 of this section or similar duties and responsibilities;
  - (c) Each paid employee of a District government agency considered a covered child or youth services provider, who occupies a position with duties and responsibilities as described in section 412.13 of this section or similar duties and responsibilities;
  - (d) Each volunteer in a District government agency considered a covered child or youth services provider in an unsupervised position with duties and responsibilities as described in section 412.13 of this section or similar duties and responsibilities; and
  - (e) Any employee of a District government agency who volunteers his or her services as a host of a child or youth participating in the Summer Youth Employment Program within his or her agency. Such an employee shall be considered a volunteer for the purposes of the Act, and the provisions of this section with regard to volunteers shall apply to him or her.

*Section 412.12 is amended to read as follows:*

- 412.12 (a) Pursuant to section 203 (b), (c), and (d) of the Act (D.C. Official Code § 4-1501.03 (b), (c), and (d)) (2005 Supp.), criminal background checks are not required for the following persons:
- (1) A person being considered for compensated or voluntary employment

with a District government agency considered a covered child or youth services provider that will not bring the person in direct contact with children or youth;

- (2) A volunteer in a District government agency considered a covered child or youth services provider who has only supervised contact with children or youth; however, if applicable, such person will be required to submit to a traffic record check pursuant to section 204 (b)(2) of the Act (D.C. Official Code § 4-1501.04 (b)(2)) (2005 Supp.);
  - (3) A person being considered for compensated or voluntary employment with a District government agency considered a covered child or youth services provider who has an active federal security clearance; and
- (b) Criminal background checks shall not be required for sworn members of the MPD who meet the criteria under the Act, as current standards with respect to criminal background checks within the MPD exceed the requirements set forth in the Act.

*A new section 412.13 (t) is added to read as follows; and section 412.13 (t) is renumbered as 412.13 (u):*

412.13 Upon consulting with the head of a District government agency considered a covered child or youth services provider, the appropriate personnel authority shall identify and determine which positions in the agency shall be covered under the Act. In identifying the covered positions, the personnel authority shall ensure that the duties and responsibilities of each position require the provision of direct services that affect the health, safety, and welfare of children or youth or services for the benefit of children or youth, including but not limited to, at least one (1) of the following duties and responsibilities:

- (a) Childcare duties;
- (b) Recreational activities;
- (c) Delinquency prevention and control services, including custody, security, supervision, and residential and community support services for committed and detained juvenile offenders;
- (d) Educational activities;
- (e) Individual counseling;
- (f) Group counseling;
- (g) Assessment, case management and support services;

- (h) Psychiatric and psychological assessment services;
- (i) Developmental, speech, and language evaluation services;
- (j) Diagnostic evaluation and treatment services;
- (k) Childhood development services;
- (l) Medical or clinical services;
- (m) Therapeutic services, including individual and group therapy, and play therapy;
- (n) Prevention and intervention services;
- (o) Mentoring services;
- ~~(p) Youth care services;~~
- (q) Healthcare services, including medical, behavioral, mental health, dental, vision, nutrition, or developmental services;
- (r) Cultural enrichment services;
- (s) Public safety services, including counseling or education intervention services about safety, crime prevention, fire safety, youth problem-solving;
- (t) Youth employment services; or
- (u) Driving a motor vehicle to transport children or youth.

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412.14 The following standards shall be applied in identifying positions, compensated or not, which shall be subject to the criminal background check requirement or the traffic record check requirement under the Act:

- (a) The underlying guiding standard to be applied in identifying positions that shall be subject to the criminal background check requirement and traffic record check requirement shall be one of reasonableness, coupled with the standards outlined in section 412.14 (b) through (k) of this section, as applicable.
- (b) A determination that a position is covered under the Act and subject to the criminal background check requirement shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties contains at least one (1) of the duties and responsibilities

listed in section 412.13 of this section or similar duties and responsibilities and that any incumbent of the position will perform the duties and responsibilities personally and routinely.

- (c) The single fact that a position is located in a District government agency considered a covered child or youth services provider does not automatically make the position or its incumbent subject to the criminal background check requirement or the traffic record check requirement of the Act.
- (d) Strictly tangential, casual, or occasional contact with children or youth does not automatically make an employee or volunteer subject to the criminal background check requirement or traffic record check requirement of the Act.
- (e) Administrative, clerical, or technical support positions within the immediate office of the head of a District government agency considered a covered child or youth services provider as well as within other components, units, or divisions of the agency that provide non-operational support services shall not be subject to the criminal background check requirement unless the position descriptions or statements of duties, as applicable, contain at least one (1) of the duties and responsibilities listed in section 412.13 of this section, or similar duties and responsibilities related to the direct provision of services to children or youth, and a determination is made that any incumbents of the positions will perform the duties and responsibilities personally and routinely. Such positions may include, but are not limited to the head of the agency, special assistants, administrative officers, staff assistants, and secretaries.
- (f) An employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a covered position shall be subject to an initial criminal background check upon the personnel action being effected and to periodic criminal background checks while detailed, temporarily promoted, or temporarily reassigned.
- (g) A volunteer whose assignment changes from non-covered duties and responsibilities to covered duties and responsibilities shall be subject to an initial criminal background check upon being moved to the covered assignment and to periodic criminal background checks while in the covered assignment.
- (h) A determination that a position is subject to the traffic record check requirement under the Act shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties requires that any incumbent of the position drive a motor vehicle to transport children or youth in the course of performing his or her duties.

- (i) An employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a position that will require him or her to drive a motor vehicle to transport children or youth in the course of performing the duties of the detail, temporary promotion, or temporary reassignment shall be subject to an initial traffic record check upon the personnel action being effected.
- (j) A volunteer whose assignment changes from non-covered duties and responsibilities to duties and responsibilities that will require him or her to a drive motor vehicle to transport children or youth in the course of performing the duties of the voluntary assignment shall be subject to an initial traffic record check requirement upon being moved to the covered assignment.
- (k) Except as specified in section 412.12 of this section, any position subject to the traffic record check requirement shall also be subject to the criminal background check requirement.

~~412.15 District government agencies considered covered child or youth services providers may submit information and documentation to the appropriate personnel authority to challenge the designation of a position as subject to a criminal background check or traffic record check. The personnel authority shall evaluate any information and documentation submitted by an agency, and promptly determine whether the original designation shall stand or be changed.~~

412.16 Vacancy announcements for positions identified and designated as requiring a criminal background check or traffic record check, or both, shall include statements informing each applicant that:

- (a) The position for which he or she is applying has been identified and designated as requiring a criminal background check or traffic record check, or both;
- (b) If tentatively selected for the position, a criminal background check or traffic record check, or both, as appropriate, will be conducted; and
- (c) The employing agency may offer employment to the appointee to the position contingent upon receipt of a satisfactory criminal background check or traffic record check, or both.

412.17 In the case of non-competitive recruitment for a position requiring a criminal background check or traffic record check, or both, the appropriate personnel authority shall inform the person being considered for employment, in writing, of the requirements specified in section 412.16 of this section.

412.18 The Director, D.C. Office of Personnel (or his or her designee), shall publish the list of positions in agencies under the personnel authority of the Mayor that are

subject to a criminal background check or traffic record check, or both, in the District Personnel Manual (or any other procedural manual developed). The list shall be published on an annual basis.

*Section 412.19 is amended to read as follows:*

- 412.19 (a) Pursuant to section 203 (e) of the Act (D.C. Official Code § 4-1501.03 (e)) (2005 Supp.), an appointee to a compensated position with a District government agency considered a covered child or youth services provider may be offered employment contingent upon receipt of a satisfactory criminal background check or traffic record check, or both, and begin working in a supervised setting, prior to receiving the results of the checks, and prior to the employing agency making a determination that the appointee meets the requirements of the Act.
- (b) Notwithstanding the provisions in section 412.19 (a) of this section, the Director of Personnel or independent personnel authority may determine that ~~it is not feasible or appropriate to offer employment to appointees contingent upon receipt of a satisfactory criminal background check or traffic record check, or both, nor allow them to begin working in a supervised setting prior to receiving the results of the checks.~~ If such a determination is made, the personnel authority shall so inform the agency or agencies impacted by the determination.

*Section 412.20 is amended to read as follows:*

- 412.20 Pursuant to section 203 (f) of the Act (D.C. Official Code § 4-1501.03 (f)) (2005 Supp.), an appointee to an unsupervised volunteer position with a District government agency considered a covered child or youth services provider shall not be allowed to begin volunteering in an unsupervised setting until the results of the criminal background check or traffic record check, or both, are received and a determination is made that the appointee meets the requirements of the Act.

*Section 412.21 is amended to read as follows:*

- 412.21 Prior to a criminal background check being conducted, the appropriate personnel authority will inform each appointee, employee, or unsupervised volunteer subject to the check of the location of the office where the check will be conducted, when to report for fingerprinting, and provide each appointee, employee, or unsupervised volunteer with a form or forms to be utilized for the following purposes:
- (a) To authorize the MPD or other entity, as appropriate, to conduct the criminal background check and confirm that the appointee, employee, or unsupervised volunteer has been informed that the employing agency is authorized to conduct a criminal background check;

- (b) To complete a signed affirmation stating whether or not the appointee, employee, or unsupervised volunteer has been convicted of a crime, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the following felony offenses or their equivalent in another state or territory:
- (1) Murder, attempted murder, manslaughter, or arson;
  - (2) Assault, assault with a dangerous weapon, mayhem, malicious disfigurement, or threats to do bodily harm;
  - (3) Burglary;
  - (4) Robbery;
  - (5) Kidnapping;
  - (6) Illegal use or possession of a firearm;
  - (7) Sexual offenses, including indecent exposure; promoting, procuring, compelling, soliciting, or engaging in prostitution; corrupting minors (sexual relations with children); molesting; voyeurism; committing sex acts in public; incest; rape; sexual assault; sexual battery; or sexual abuse; but excluding sodomy between consenting adults;
  - (8) Child abuse or cruelty to children; or
  - (9) Unlawful distribution or possession of or possession with intent to distribute, a controlled substance;
- (c) To acknowledge in writing that the appointee, employee, or unsupervised volunteer has been notified of his or her right to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report;
- (d) To acknowledge that the employing agency may choose to deny the appointee employment or an unsupervised volunteer position, or to terminate an employee or volunteer, based on the outcome of the criminal background check;
- (e) To provide any additional identification that is required, such as name, social security number, date of birth, and gender; and
- (f) To inform the appointee or employee that a false statement on the form or forms may subject them to criminal penalties.

412.22 Upon receiving and completing the form or forms specified in section 412.21 of this section, the appointee or employee shall report to the designated location to be fingerprinted.

*Section 412.23 is amended to read as follows:*

- 412.23 (a) Upon completing each criminal background check, the designated MPD representative, or the representative for any other entity conducting the check, shall forward the check to the appropriate personnel authority, with a copy to the employing agency.
- (b) The personnel authority shall complete the review and determination process pursuant to sections 412.24 through 412.32 of this section, and make a recommendation, in writing, to the employing agency as to whether or not the appointee, employee, or volunteer subject to the check poses a present danger to children or youth that would make him or her ineligible for paid employment or unsupervised voluntary service.

*Section 412.24 is amended to read as follows:*

412.24 Pursuant to section 205a (a) of the Act, the information obtained from a criminal background check shall not immediately disqualify or create a presumption against employment or volunteer status of an appointee, employee, or unsupervised volunteer subject to the check, unless the Mayor determines that the appointee, employee, or unsupervised volunteer poses a present danger to children or youth. The Mayor's authority to make the final determination is delegated to the head of each subordinate or independent agency covered under the Act. The head of an agency covered under the Act may sub-delegate this authority to agency officials as appropriate.

*Section 412.25 is amended to read as follows:*

~~412.25~~ Except as provided in section 412.26 of this section, the following factors shall be considered to determine if an appointee subject to a criminal background check poses a present danger to children or youth that would make him or her ineligible for paid employment or unsupervised voluntary service:

- (a) The specific duties and responsibilities necessarily related to the employment sought;
- (b) The bearing, if any, the criminal offense for which the appointee was previously convicted will have on his or her fitness or ability to perform one (1) or more of the duties or responsibilities of the position;
- (c) The time which has elapsed since the occurrence of the criminal offense;

- (d) The age of the person at the time of the occurrence of the criminal offense;
- (e) The frequency and seriousness of the criminal offense;
- (f) Any information produced by the appointee, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense; and
- (g) The public policy that is beneficial generally for ex-offenders to obtain employment.

*Section 412.26 is amended to read as follows:*

- 412.26 Notwithstanding the factors listed in section 412.25 of this section, a covered District government agency shall not employ or permit to serve as an unsupervised volunteer an appointee who has been convicted of, has pleaded nolo contendere to, is on probation before judgment or placement of a case upon a stet docket because of, or has been found not guilty by reason of insanity for any sexual offenses involving a minor.
- 412.27 Records of traffic infractions shall be judged on an individual basis for appointees whose duties would include driving a motor vehicle to transport children or youth as described in the Act. A pattern of disregard for existing traffic regulations, particularly where there has been a conviction for driving under the influence of intoxicants or drugs, may make the appointee ineligible for employment or voluntary service, if the appointee could be required to drive a motor vehicle to transport children or youth in the course of performing his or her duties.

*Section 412.28 is amended to read as follows:*

- 412.28 Based on the outcome of the criminal background check, application of the factors listed in section 412.25 of this section, and the written recommendation of the personnel authority, each covered employing agency shall make a final determination whether or not the appointee poses a present danger to children or youth, and whether a final offer of appointment should be made or denied or, when the appointee to a compensated position was allowed to begin working in a supervised setting prior to receiving the results of the check, if he or she will be retained or employment will be terminated.

*Section 412.29 is amended to read as follows:*

- 412.29 If the determination is to deny the final offer of appointment or terminate employment, if applicable, the employing agency shall do all of the following:
- (a) Send the appointee a written notification of the determination. The written notification shall inform the appointee of the specific basis for the determination, and of his or her right to obtain a copy of the criminal

background check report and challenge the accuracy and completeness of the report or the basis for denying the final offer of appointment stated by the employing agency, in writing, within ten (10) days of receiving the written notification; and

- (b) Send the personnel authority a copy of the written notification.

*Section 412.30 is amended to read as follows:*

- 412.30 In challenging the results of a criminal background check report or the basis for denying the final offer of appointment stated by the employing agency, the appointee may present information and documentation to clarify any errors in the report resulting from mistakes in identity, and any mitigating circumstances that may exist concerning the report.

*Section 412.31 is amended to read as follows:*

- 412.31 Upon receiving a challenge, the appropriate employing agency shall promptly make a determination on the case and notify the appointee of the decision, in writing, with a copy to the personnel authority. In accordance with section 205a (c) of the Act, if employment is denied or terminated because the appointee, employee, or unsupervised volunteer, as applicable, poses a present danger to children or youth, the written notification shall inform the individual that he or she may appeal the denial to the Commission on Human Rights of the District within thirty (30) days of the date of the written notification.
- 412.32 If the determination is that a final offer of appointment should be made to an appointee who did not begin working prior to the employing agency receiving the results of the check, the employing agency shall promptly notify the personnel authority.
- 412.33 Upon receiving the employing agency's determination that a final offer of appointment should be made to an appointee, the appropriate personnel authority shall promptly issue a final offer letter to the appointee. If the determination is to terminate employment, the personnel authority will process the action to terminate the employment within ten (10) days of receiving the employing agency's determination.
- 412.34 An appointee under this section who intentionally provides false information that is material to the application in the course of applying for a position shall be subject to prosecution pursuant to section 404 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-2405) (2001).

*Section 412.35 is amended to read as follows:*

412.35 Pursuant to section 205 (e) of the Act (D.C. Official Code § 4-1501.05 (e)) (2005 Supp.), a volunteer in an unsupervised position may use the same successful criminal background check conducted on him or her for a period of two (2) years when applying for multiple unsupervised volunteer positions, if the volunteer provides a signed affirmation stating whether or not he or she has been convicted of a crime, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the felony offenses listed in section 412.21 (b)(1) through (9) of this section, or their equivalent in any other state or territory, since the date of the most recent check.

*Section 412.36 is amended to read as follows:*

- 412.36 (a) A periodic criminal background check for each current employee and unsupervised volunteer occupying a covered position shall be conducted ~~within two (2) years of the initial criminal background required under section 412.2 of this section, and every two (2) years thereafter.~~ Prior to the periodic criminal background check being conducted, each employee or unsupervised volunteer subject to the check shall complete the signed affirmation described in section 412.21 (b) of this section.
- (b) In addition to the two-year (2-year) periodic criminal background check requirement, each employee and unsupervised volunteer shall be required to:
- (1) Complete a signed affirmation every year stating whether or not he or she has been convicted of a crime, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the felony offenses listed in section 412.21 (b)(1) through (9) of this section, or their equivalent in any other state or territory, since the date of the most recent check; and
  - (2) Disclose to his or her supervisor any arrest, conviction of a crime, plea of nolo contendere, probation before judgment or placement of a case upon a stet docket, or if he or she has been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the felony offenses listed in section 412.21 (b)(1) through (9) of this section, or their equivalent in any other state or territory, immediately after any of these actions occur.

*A new section 412.37 is added to read as follows:*

- 412.37 In addition to the two-year (2-year) periodic criminal background check pursuant to section 412.36 of this section, a criminal background check shall be conducted when:
- (a) Derogatory information about the employee or unsupervised volunteer, of a nature that will impact the employee's or unsupervised volunteer's suitability to continue performing the duties of the covered position, is disclosed to the employing agency or personnel authority by a credible source or sources, or is independently discovered by the employing agency or personnel authority; or
  - (b) Information about a criminal offense committed by the employee or unsupervised volunteer, such as the criminal offenses listed in section 412.21 of this section, is disclosed to the employing agency or personnel authority by a credible source or sources, or is independently discovered by the employing agency or personnel authority.

*Section 412.37 is renumbered as 412.38 and amended to read as follows:*

- 412.38 (a) An employee who fails a periodic criminal background check may be subject to administrative action up to and including removal. In determining the type of administrative action to be taken, the employing agency shall consider the factors listed in section 412.25 of this section as well as any other similar factors and variables, except that a criminal background check reflecting that an employee has been convicted of, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity for any sexual offenses involving a minor shall result in removal.
- (b) An employee who intentionally misinforms or misleads his or her employing agency when completing the signed affirmation under section 412.36 (b)(1) of this section; or fails to make disclosure under section 412.36 (b)(2) of this section, shall be subject to administrative action up to and including removal.

*A new section 412.39 is added to read as follows:*

- 412.39 In addition to or in the place of administrative action, and at the employing agency's discretion, an employee who fails a periodic check may be reassigned to a non-covered position, except that this option shall not be available for an employee whose criminal background check reflects that he or she has been convicted of, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity for any sexual offenses involving a minor.

*Section 412.38 is renumbered as 412.40 and amended to read as follows:*

- 412.40 An unsupervised volunteer who fails a periodic criminal background check may be terminated or moved to another volunteer assignment that does not include the

covered position, subject to the satisfactory completion of a criminal background check or a traffic record check, or both.

**Volunteer** – for the purposes of section 412 of this chapter, any person who performs work without any monetary or other financial compensation, in a covered position, for a District government agency considered a child or youth services provider; or an employee of the District government who volunteers his or her services as a host of a child or youth participating in the Summer Youth Employment Program within his or her agency.

**Youth** – for the purposes of section 412 of this chapter, persons between thirteen (13) and seventeen (17) years of age, inclusive.

Comments on these proposed regulations should be submitted, in writing, to Lisa R. Marin, SPHR, Director of Personnel, 441 4<sup>th</sup> Street, N.W., Washington, D.C. 20001, within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of these proposed regulations are available from the above address.