

**REPORT OF THE
JOINT COMMISSION ON HEALTH CARE**

**Interim Report on the Impact
of Barrier Crime Laws on
Social Service and
Health Care Employers**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



SENATE DOCUMENT NO. 25

**COMMONWEALTH OF VIRGINIA
RICHMOND
2006**

JOINT COMMISSION ON HEALTH CARE: 2006

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COMMONWEALTH of VIRGINIA
Joint Commission on Health Care

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December 20, 2006

TO: The Honorable Timothy M. Kaine, Governor of Virginia
And
Members of the Virginia General Assembly

The 2006 General Assembly, in Senate Joint Resolution 106, directed the Joint Commission on Health Care to conduct a two-year study of "the impact of barrier crimes laws on social services and health care employers, prospective employees, consumers, residents, patients, and clients." A final report of the study is due prior to the 2008 General Assembly Session.

Enclosed for your review and consideration is the interim report, consisting of a preface, executive summary, and study presentation.

Respectfully submitted,

A handwritten signature in cursive script that reads "Phillip A. Hamilton".

Phillip A. Hamilton
Chairman

PREFACE

Senate Joint Resolution 106 of the 2006 General Assembly Session directed the Joint Commission on Health Care (JCHC) to conduct a two-year study of “the impact of barrier crimes laws on social services and health care employers, prospective employees, consumers, residents, patients, and clients.”

Barrier crime laws prohibit persons convicted of certain statutorily-defined crimes from obtaining employment with certain employers, primarily those employers specializing in the care of vulnerable populations, such as children, the elderly, and those with mental disabilities. Preliminary research indicates that as workplace violence and crime rates grew, as well as negligent hiring lawsuits, the list of barrier crime laws and mandatory background checks also grew. Additionally, preliminary interviews reveal that persons with a history of mental illness and/or substance abuse problems often have criminal backgrounds related to their illness, and often have difficulty obtaining employment, making rehabilitation more difficult. Furthermore, some employers report on having difficulty maintaining a qualified workforce.

Over the next year, JCHC staff will examine applicable federal barrier crime laws and regulations and determine if there are any barrier crime law exceptions that are barred by federal law. A 50-state statutory analysis will be conducted to compare Virginia’s barrier crime laws to those in other states. Additionally, JCHC staff will analyze the effectiveness of barrier crime laws in protecting consumers, residents, patients, and clients; as well as gather information on employment discrimination based on an individual’s criminal record. Furthermore, staff will conduct interviews and receive additional comments from affected entities and individuals to examine the difficulty experienced by prospective employees in finding jobs and prospective employers in finding qualified applicants. Finally, the issue of negligent hiring and its impact on barrier crime legislation will be examined.

This interim report includes a preface, executive summary, and presentation of background information. The final report, which will include options presented for JCHC consideration, will be completed prior to the 2008 General Assembly Session.

December 2006

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September 14, 2006 Slide Presentation

Appendix A: Senate Joint Resolution 106 (2006)

Impact of Barrier Crime Laws on Social Service and Health Care Employers – SJR 106 (2006)

EXECUTIVE SUMMARY

Background

SJR 106 of the 2006 General Assembly Session directed the Joint Commission on Health Care (JCHC) to study the impact of barrier crime laws on social service and health care employers. SJR 106 is a two-year study, with staff researching the issue and reporting its findings and options to the Commission in the spring of 2007. The final report and recommendations will be presented to the Governor and the 2008 General Assembly.

Barrier crime laws prohibit persons convicted of certain statutorily-defined crimes from obtaining employment with certain employers, primarily those employers specializing in the care of vulnerable populations, such as children, the elderly, and those with mental disabilities. Preliminary research indicates that as workplace violence and crime rates grew, as well as negligent hiring lawsuits, the list of barrier crime laws and mandatory background checks also grew. Additionally, preliminary interviews reveal that persons with a history of mental illness and/or substance abuse problems often have criminal backgrounds related to their illness or substance abuse problems, and often have difficulty obtaining employment, making rehabilitation more difficult. Furthermore, some employers report on having difficulty maintaining a qualified workforce.

Virginia Barrier Crime Laws

Currently, Virginia has barrier crime laws pertaining to such social service and health care employers as:

- Child welfare agencies;
- Foster and adoptive homes;
- Licensed nursing homes;
- Hospital pharmacy employees;
- Home care organizations;
- Licensed hospice;
- DMHMRSAS employees at state facilities, those that handle state funds, and those employees in direct consumer care positions;
- Community Service Boards;
- Behavioral Health Authorities;
- Child day centers;
- Family day homes;
- Assisted living facilities; and
- Adult day centers.

The *Code of Virginia* § 63.2-1719 defines 31 types of crimes as “barrier crimes.” Twenty-six of these crimes are felonies, and include:

Murder	Malicious wounding
Abduction	Abduction for immoral purpose
Assaults & bodily wounding	Robbery
Carjacking	Felony stalking
Sexual assault	Arson
Drive-by shooting	Use of machine gun
Aggressive use of machine gun	Use of sawed-off shotgun
Pandering	Crimes against nature (children)
Taking indecent liberties	Indecent liberties (custodial relationship)
Abuse & neglect of children	Possession of pornography, intent to distribute
Possession child pornography	Electronic facilitation pornography
Abuse & neglect of incapacitated adults	Delivery of drugs to prisoners
Escape from prison	Felonies by prisoners

For child welfare agencies or foster and adoptive homes additional barrier crimes include:

- Burglary;
- Felony violation relating to possession or distribution of drugs;
- Conviction of any other felony not included in the definition of barrier crime unless five years have elapsed since conviction; and,
- A founded complaint of child abuse and neglect.

For the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS), community services boards (CSBs), and behavioral health authorities (BHAs) additional barrier crimes for direct consumer care positions include:

- Burglary;
- Extortion by threat;
- Distribution of drugs; and,
- Possession of drugs.

State-level background checks are completed by all of the employers subject to barrier crime laws. DMHMRSAS, CSBs, BHAs, and children’s residential facilities also complete national background checks. If funding is available, child welfare agencies, licensed nursing homes, home care organizations, licensed hospice, unlicensed child day centers, assisted living facilities, adult day centers, child day centers, and family day homes will be required to obtain national background checks as of July 1, 2007.

Virginia Barrier Crime Law Exceptions

There are some statutory exceptions to Virginia’s barrier crime laws:

- Nursing homes, home care organizations, hospice, assisted living facilities, and adult day centers may employ a person if he/she had one misdemeanor conviction, not involving abuse or neglect, and more than five years have elapsed since the conviction.
- Child day centers and family day homes may employ a person if he/she was convicted of not more than one misdemeanor offense of assault if 10 years have elapsed following conviction, unless the offense was committed while employed in a child day center or the offense was committed against a minor.
- DMHMRSAS, CSBs, and BHAs may employ a direct consumer care provider if he/she was convicted of not more than one misdemeanor for assault or assault on a family or household member if more than 10 years have elapsed.

A special screening assessment is provided in the *Code of Virginia* §§ 37.2-416, 37.2-506 which states: "At Adult Substance Abuse Treatment facilities, a person who was convicted of a misdemeanor relating to (i) unlawful hazing; (ii) reckless handling of a firearm; or any misdemeanor or felony related to (a) reckless endangerment of others by throwing objects (b) threat; (c) breaking & entering a dwelling house w/ intent to commit misdemeanor; or (d) possession burglarious tools; or any felony violation relating to the distribution of drugs, except an offense pursuant to 18.2-248 H1 and H2; or an equivalent offense in another state, if the hiring provider determines, based upon screening assessment, that criminal behavior was substantially related to applicant's substance abuse and that person has been successfully rehabilitated and is not a risk to consumers based on criminal history and substance abuse history."

Year Two Workplan

Over the next year, staff will examine applicable federal barrier crime laws and regulations, identify pending legislation, determine if there are any barrier crime law exceptions that are barred by federal law, and conduct a 50 state statutory analysis to compare Virginia's barrier crime laws to those in other states. Additionally, staff will analyze the effectiveness of barrier crime laws in protecting consumers, residents, patients, and clients; as well as gather information on employment discrimination based on an individual's criminal record. Furthermore, staff will conduct interviews and receive additional comments from affected entities and individuals to examine the difficulty experienced by prospective employees in finding jobs and prospective employers in finding qualified applicants. Finally, staff will address the issue of negligent hiring and its impact on barrier crime legislation. Policy options will be presented to the Joint Commission on Health Care for consideration prior to the 2008 General Assembly Session.

JCHC Staff for this Report

Jaime H. Hoyle

Senior Staff Attorney/Health Policy Analyst

Interim Report: Impact of Barrier Crime Laws on Social Service and Health Care Employers (SJ 106)

Presentation to:
The Joint Commission On Health Care

Jaime H. Hoyle
Senior Staff Attorney



September 14, 2006
Richmond, Virginia

Authority for the Study

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- SJR 106 (2006) directs JCHC to study the impact of barrier crime laws on social service and health care employers.
- Specifically, JCHC shall:
 - Determine the effectiveness of barrier crimes laws in protecting consumers, residents, patients, and clients;
 - Examine the difficulty experienced by employers in finding qualified applicants and employees and the difficulty experienced by prospective employees in finding jobs;
 - Compare Virginia's barrier crimes laws with laws related to criminal convictions and employment in other states; and,
 - Gather data on employment discrimination based on an individual's criminal conviction record from state agencies, institutions, boards, bureaus, commissions, councils, or any instrumentality of the Commonwealth.



Authority for the Study (cont.)

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- In conducting the study, JCHC staff shall consider comments from affected entities, including:
 - Representatives of Long-Term Care Providers and Advocacy Groups;
 - The Virginia Association of Community Service Boards;
 - The Substance Abuse and Addiction Recovery Alliance;
 - The Consortium of Substance Abuse Organizations;
 - The Virginia Association of Drug and Alcohol Programs;
 - The Virginia Association of Alcoholism and Drug Abuse Counselors;
 - The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS);
 - The Department for the Aging; and,
 - The Department of Rehabilitative Services.


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Presentation Outline

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- *Virginia's Barrier Crime Laws*
- Background on Barrier Crime Laws
- Outline for Year Two of Study


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Barrier Crime Laws

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- Barrier crime laws prohibit persons convicted of certain statutorily-defined crimes from obtaining employment with certain employers, mostly those employers specializing in the care of vulnerable populations, such as children, the elderly, and those with mental disabilities.
- Currently, Virginia has barrier crime laws pertaining to such social service and health care employers as: child welfare agencies; foster and adoptive homes; licensed nursing homes; hospital pharmacy employees; home care organizations; licensed hospice; DMHMRSAS employees at state facilities and those that handle state funds; DMHRMRSAS employees in direct consumer care positions; Community Service Boards (CSBs); Behavioral Health Authorities (BHAs); child day centers; family day homes; assisted living facilities; and adult day centers.



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Virginia Barrier Crime Laws

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- Currently, the *Code of Virginia* § 63.2-1719 defines 31 types of crimes as “barrier crimes” (including equivalent offense in another jurisdiction):
 - 26 are felonies; and,
 - 4 are misdemeanors. (These include: threats; incest; failure to secure medical attention for an injured child; employing or permitting a minor to assist in committing obscene act).



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Virginia Barrier Crime Laws (cont.)

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- The 26 felonies listed in the *Code of Virginia* § 63.2-1719 include:
 - Murder;
 - Abduction;
 - Assaults & Bodily Wounding;
 - Carjacking;
 - Sexual Assault;
 - Drive-by Shooting;
 - Aggressive use of Machine Gun;
 - Pandering;
 - Taking Indecent liberties;
 - Abuse & Neglect of Children;
 - Possession of child pornography;
 - Abuse & Neglect of Incap. Adults;
 - Escape from Prison; and,
 - Malicious Wounding;
 - Abduction for Immoral Purpose;
 - Robbery;
 - Felony Stalking;
 - Arson;
 - Use of Machine Gun;
 - Use of Sawed-off Shotgun;
 - Crimes Against Nature involving Children;
 - Taking Indecent liberties, custodial relationship;
 - Poss. of Pornography with intent to distribute;
 - Electronic Facilitation of Pornography;
 - Delivery of Drugs to Prisoners;
 - Felonies by Prisoners.



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Virginia Barrier Crime Laws (cont.)

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- This Code section also adds 4 felonies to the definition of “barrier crime” when referring to child welfare agencies or foster and adoptive homes. These include:
 - Burglary;
 - Felony violation relating to possession or distribution of drugs;
 - Conviction of any other felony not included in the definition of barrier crime unless 5 years have elapsed since conviction; and,
 - A founded complaint of child abuse and neglect.
- In addition to the barrier crimes listed in *Code of Virginia* § 63.2-1719, DMHMRSAS, CSBs, and BHAs also include 4 more crimes that act as a bar to employment. These include convictions for:
 - Burglary;
 - Extortion by Threat;
 - Distribution of drugs; and,
 - Possession of drugs.



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Virginia Barrier Crime Laws (cont.)

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- There are no barrier crimes related to the employment of hospital pharmacy employees.
 - However, a licensed hospital must obtain a background check to employ a hospital pharmacy employee, but the information contained in the criminal history record is not an automatic bar to employment.
- Child welfare agencies, specific DMHMRSAS positions, and children's residential facilities have the longest lists of barrier crimes, with 36.



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Virginia Barrier Crime Laws (cont.)

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- All of the entities with barrier crime laws require state background checks.
 - Currently, DMHMRSAS, CSBs, BHAs, and children's residential facilities obtain both state and national background checks.
 - Effective July 1, 2007, child welfare agencies, licensed nursing homes, home care organizations, licensed hospice, unlicensed child day centers, assisted living facilities, adult day centers, child day centers, and, family day homes will be required to obtain state and national background checks.
 - Hospital pharmacy employees are only required to undergo a state background check.



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Virginia Barrier Crime Laws Exceptions

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- There are some statutory exceptions to Virginia's barrier crime laws.
 - The exception related to nursing homes, home care organizations, hospice, assisted living facilities, and adult day centers allows a person to be employed if he/she had one misdemeanor conviction, not involving abuse or neglect, and more than 5 years have elapsed since the conviction.

 - The exception for child day centers and family day homes allows a person to obtain employment if he/she was convicted of not more than one misdemeanor offense of assault if 10 years have elapsed following conviction, unless person committed such offense while employed in child day center or object of offense was minor.



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Virginia Barrier Crime Laws Exceptions (cont.)

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- Two exceptions relate to DMHMRSAS direct consumer care positions, CSBs and BHAs:
 - Conviction of not more than one misdemeanor for assault or assault on a family or household member if more than 10 years have elapsed.

 - “At Adult Substance Abuse Treatment facilities, a person who was convicted of a misdemeanor relating to (i) unlawful hazing; (ii) reckless handling of a firearm; or any misdemeanor or felony related to (a) reckless endangerment of others by throwing objects (b) threat; (c) breaking & entering a dwelling house w/ intent to commit misdemeanor; or (d) possession burglarious tools; or any felony violation relating to the distribution of drugs, except an offense pursuant to 18.2-248 H1 and H2; or an equivalent offense in another state, if the hiring provider determines, based upon screening assessment, that criminal behavior was substantially related to applicant's substance abuse and that person has been successfully rehabilitated and is not a risk to consumers based on criminal history and substance abuse history.” *Code of Virginia* §§ 37.2-416, 37.2-506.



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Presentation Outline

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- Virginia's Barrier Crime Laws
- Background on Barrier Crime Laws*
- Outline for Year Two of Study



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Background

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- Barrier crime laws came into existence to protect the most vulnerable populations.
- Preliminary research indicates that as workplace violence and crime rates grew, as well as negligent hiring lawsuits, the list of barrier crime laws and mandatory background checks also grew.



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Background (cont.)

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- Preliminary interviews reveal that persons with a history of mental illness and/or substance abuse problems often have criminal backgrounds related to their illness or substance abuse problems, and often have difficulty obtaining employment, making rehabilitation more difficult.
- Furthermore, employers also have difficulty obtaining a qualified workforce.
- Some employers, such as the CSBs, would like to have additional exceptions made in the barrier crime laws they follow.
- Others, such as the Department of Social Services, would not.



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Presentation Outline

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- **Virginia's Barrier Crime Laws**
- Background on Barrier Crime Laws**
- Outline for Year Two of Study***



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Year Two Workplan

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- Over the next year, staff will examine any applicable federal barrier crime laws and regulations. Additionally, staff will:
 - Identify any pending legislation; and,
 - Determine if there are any barrier crime law exceptions that are barred by Federal law.
- Staff will conduct a 50 state statutory analysis to compare Virginia's barrier crime laws to those in other states.
- Staff will gather data to determine the effectiveness of barrier crimes laws in protecting consumers, residents, patients, and clients.



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Year Two Workplan (cont.)

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- Staff will conduct interviews and receive additional comments from affected entities and individuals to examine the difficulty experienced by prospective employees in finding jobs and prospective employers in finding qualified applicants.
- Staff will gather information on employment discrimination based on an individual's criminal record.
- Staff will address the issue of negligent hiring and its impact on barrier crime legislation.
- Staff will formulate policy options for JCHC consideration.



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APPENDIX A

2006 SESSION

ENROLLED

SENATE JOINT RESOLUTION NO. 106

Directing the Joint Commission on Health Care to study the impact of barrier crimes laws on social service and health care employers, prospective employees, consumers, residents, patients, and clients. Report.

Agreed to by the Senate, March 8, 2006
Agreed to by the House of Delegates, March 6, 2006

WHEREAS, many employers are required by law to do a criminal background check of any person who is to be hired for compensated employment; and

WHEREAS, these employers are providers of services to senior citizens, children, and people with mental disabilities; and

WHEREAS, these employers also are prohibited by law from hiring persons who have been convicted of certain crimes; and

WHEREAS, the laws related to criminal background checks and barrier crimes were designed to protect those who are least able to protect themselves; and

WHEREAS, the General Assembly has recognized that some people with addictions are convicted of crimes that are related to their addictions and, absent the addiction, these people would not have engaged in any criminal behavior; and

WHEREAS, the General Assembly has carved out some exceptions to the barrier crimes laws for people who were convicted of crimes related to their addiction so they can work in adult substance abuse treatment programs; and

WHEREAS, employers in service delivery agencies impacted by the barrier crimes laws often have difficulty finding qualified applicants and employees with the appropriate skills; and

WHEREAS, potential applicants who have been convicted of crimes know that they cannot be hired for certain positions and, therefore, do not even apply; and

WHEREAS, prior to passage of the barrier crimes laws, most of these employers were checking the state criminal convictions database and refusing to hire people who had certain criminal convictions in their history; and

WHEREAS, these barrier crimes laws allowed employers the necessary ability to receive results from the Central Criminal Records Exchange (CCRE) based on the understanding that federal law prohibited dissemination of specific criminal records to nongovernmental entities; and

WHEREAS, it is clear now that federal law does not prohibit access to the CCRE results by nongovernmental entities; and

WHEREAS, a bar to employment and the resultant report on the applicant's criminal background does not give the employer a complete picture of the applicant's criminal record and prevents the employer from screening based on convictions other than those that are a statutory bar; and

WHEREAS, the employer has a legal duty to protect its consumers, residents, patients, and clients from injury caused by employees who the employer knew or should have known posed a risk of harm to others; and

WHEREAS, this civil liability provides great incentive for an employer not to hire a person with a criminal background, except in very unusual circumstances that demonstrate that, despite the criminal conviction, the prospective employee is not at all likely to re-offend; and

WHEREAS, it is not certain that the creation of barrier crimes laws provides more protection to children, the elderly, or people with mental disabilities than the employer's concerns with his legal duty to protect his consumers, residents, patients, and clients; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Joint Commission on Health Care be directed to study the impact of barrier crimes laws on social service and health care employers, prospective employees, consumers, residents, patients, and clients.

In conducting the study, the Joint Commission on Health Care shall, with regard to the barrier crimes laws: (i) determine their effectiveness in protecting consumers, residents, patients, and clients; (ii) examine the difficulty experienced by employers in service delivery agencies in finding qualified applicants and employees, as well as the difficulty experienced by prospective employees in finding jobs; (iii) compare Virginia's barrier crimes laws with laws related to criminal convictions and employment in other states; and (iv) gather data on employment discrimination based on an individual's criminal conviction record from state agencies, institutions, boards, bureaus, commissions, councils, or any instrumentality of the Commonwealth. The Joint Commission on Health Care shall consider comments from affected entities, including representatives of long-term care providers and advocacy groups, and the Virginia Association of Community Services Boards; the Substance Abuse and

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Addiction Recovery Alliance; the Consortium of Substance Abuse Organizations; the Virginia Association of Drug and Alcohol Programs; the Virginia Association of Alcoholism and Drug Abuse Counselors; the Department of Mental Health, Mental Retardation and Substance Abuse Services; the Department for the Aging; and the Department of Rehabilitative Services.

All agencies of the Commonwealth shall provide assistance to the Joint Commission on Health Care for this study, upon request.

The Joint Commission on Health Care shall complete its meetings for the first year by November 30, 2006, and for the second year by November 30, 2007, and shall apprise the Virginia State Crime Commission of its findings and recommendations each year, and the chairman shall submit to the Division of Legislative Automated Systems an executive summary of its findings and recommendations no later than the first day of the next Regular Session of the General Assembly for each year. Each executive summary shall state whether the Joint Commission on Health Care intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a House or Senate document. The executive summaries and reports shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.

JOINT COMMISSION ON HEALTH CARE

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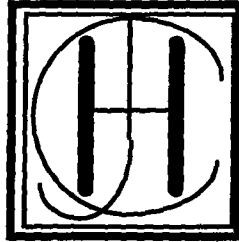
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