

Rule Summary and Fiscal Analysis (Part A)**Department of Aging**

Agency Name

Division

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Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

Criminal records check.**RULE SUMMARY**

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **No**

2. Are you proposing this rule as a result of recent legislation? **No**

3. Statute prescribing the procedure in accordance with the agency is required to adopt the rule: **119.03**

4. Statute(s) authorizing agency to adopt the rule: **173.02, 173.391, 173.392, 173.394**

5. Statute(s) the rule, as filed, amplifies or implements: **173.394**

6. State the reason(s) for proposing (i.e., why are you filing,) this rule:

ODA is proposing this new rule to replace rule 173-41-01 of the Administrative Code, which ODA is simultaneously proposing for rescission.

There are two substantial changes in the proposed new rule regarding the personal character standards. Division (F) of section 173.394 of the Revised Code says, "The department of aging shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The rules shall specify circumstances under which a community-based long-term care agency may employ a person who has been convicted of or pleaded guilty to an offense listed or described in division

(C)(1) of [section 173.394 of the Revised Code] but meets personal character standards set by the department." Therefore, ODA is required to adopt rules and is also responsible for setting the personal character standards. Under this authority, ODA is proposing two substantial changes to the personal character standards:

1. ODA is proposing to prohibit an employer from using personal character standards to hire an applicant who was convicted of repeat-theft offenses, which includes repeat offenses of breaking and entering, theft, aggravated theft, grand theft, grand theft of a motor vehicle, unauthorized use of property--computer, cable, or telecommunications property, securing writings by deception, and recovering stolen property. The rule that ODA is proposing to replace (rule 173-41-01 of the Administrative Code) prohibits an employer from using personal character standards to hire an applicant who was convicted of repeat-theft offenses, but does not include theft nor the other previously-mentioned theft-related offenses in the definition of "repeat-theft offense."

2. ODA is proposing to prohibit an employer from using personal character standards to hire an applicant who was convicted of a violent offense against a person with a disability. The rule that ODA is proposing to replace (rule 173-41-01 of the Administrative Code) prohibits an employer from using the standards to hire an applicant who was convicted of a violent offense against an older person, but not a person with a disability.

ODA is also proposing a substantial change to the definition of "direct care." Section 173.394 of the Revised Code says that an employer is required to request from BCII a criminal records check on all applicants for direct-care positions, but does not define "direct care." ODA proposes to define "direct care" in the new rule to include having access to a consumer's personal property and personal records. The rule that ODA is proposing to replace (rule 173-41-01 of the Administrative Code) defines "direct care" as including access to a consumer's personal property, but not the consumer's personal records.

There are also non-substantial changes in the proposed new rule:

1. ODA is proposing to replace the term "community-based long-term care agency" with "employer." On June 30, 2006, Am. Sub. H. B. No. 530 (126th G.A.) enacted section 173.394 of the Revised Code, which requires each community-based long-term care agency to request a criminal records check from BCII on each applicant for a direct-care position. Before the passage of HB530, only PASSPORT's providers were required to request a criminal records check from BCII on each applicant for a direct-care position.

Unfortunately, because HB530 called the provider responsible for requesting the check a "community-based long-term care agency," compliance with the law has not been optimal because non-PASSPORT providers generally associate the term "community-based long-term care agency" with a certified agency provider of a

PASSPORT service. Under section 173.39 of the Revised Code, the term "community-based long-term care agency" technically means any employer providing community-based long-term care services certified under section 173.391 of the Revised Code or non-certified under section 173.392 of the Revised Code and "agency" technically means "a person or government entity" under section 173.39 of the Revised Code, meaning that it applies to agency providers, non-agency providers, self-employed providers, consumers of consumer-directed individual providers, and operators of adult foster homes who employ caregivers.

Therefore, in the new rule, ODA is proposing to use the universal term "employer" instead of "community-based long-term care agency" so that the rule OBVIOUSLY requires each employer considering an applicant for a direct-care position to comply, not just TECHNICALLY requires each employer considering an applicant for a direct-care position to comply.

2. ODA is proposing to assign a rule number that is not sandwiched between rule numbers regarding the PASSPORT program to add clarity to the fact that this proposed new rule (and, for that matter, the current rule and section 173.394 of the Revised Code) requires all employers considering applicants for direct-care positions, not just employers who are PASSPORT providers considering applicants for direct-care positions, to perform BCII criminal records checks on the applicants. The current rule (rule 173-41-01 of the Administrative Code) appears between two PASSPORT rules.

3. ODA is proposing to simplify the introduction.

4. ODA is proposing to move the definitions of terms used in the personal character standards to the paragraphs on personal character standards to minimize cross-referencing in the rule.

5. ODA is proposing to add the name of each crime in parentheses after the section number of the Revised Code that prohibits the crime.

6. ODA is proposing to add outlining terms (e.g., "notification" and "FBI") to help readers identify the contents of certain paragraphs in order to make the rule easier to read, thereby increasing compliance.

7. ODA is proposing to consistently use "applicant" when referring to applicants because section 173.394 only pertains to applicants, and not to current employees. This should eliminate any confusion that the rule may require criminal records checks on current employees.

8. ODA is proposing to reduce verbosity, especially by eliminating excessive cross-referencing.

In this new rule, ODA is only proposing to make changes that the Ohio General Assembly has given ODA the authority to change. But, because most discussion

surrounding criminal records checks regards changes that require new laws to be passed, it is worth mentioning that, unless authorized by a future law, ODA may not:

1. Require checks on current employees (once or on a recurrent basis), on owners, or on volunteers.
2. Disqualify a person who was convicted of a crime that division (A)(3) of section 109.572 of the Revised Code does not say disqualifies the person.
3. Disqualify a person who was convicted of a crime that appears in court records, other records, or the person's confession, but does not appear in the BCII's criminal records check report.
4. Give a person ownership/portability of the criminal records check report about him/her to reduce costs when, in a short period of time, a person applies for more than one job that requires a BCII criminal records check.
5. Allow ODA's director to designate other persons who may review a criminal records check report.
6. Explicitly state who pays for a criminal records check if the person being checked is a volunteer (if a future law requires an employer to check volunteers)
7. Exempt any employers who considering applicants for direct-care positions, nor exempt any of the applicants being considered, from the requirements under section 173.394 of the Revised Code.

The Executive Medicaid Management Administration, which was created by Executive Order 2007-36S, is currently developing a plan to request legislative changes.

7. If the rule is an AMENDMENT, then summarize the changes and the content of the proposed rule; if the rule type is RESCISSION, NEW or NO CHANGE, then summarize the content of the rule:

This proposed rule implements section 173.394 of the Revised Code, including the following topics:

1. Definitions. (ODA's proposes to make a substantial change to the definition of "direct care" by including access to a consumer's personal records as part of the definition.)(The new definition of "employer" is notable, but a non-substantial change from current rule 173-41-01 of the Administrative Code, because it does not change the meaning of section 173.394 of the Revised Code. However, compared to current rule 173-41-01 of the Administrative Code, the term makes it more obvious which employers are required to comply with the rule.)

2. Identification of those subject to the rule.
 3. Notification requirements.
 4. Requirements/options regarding requests of BCII for FBI information.
 5. Forms and fingerprints.
 6. Fees.
 7. Employment service "exemption" (An employer may be exempt from requesting a BCII criminal records check if the applicant is a temporary employee from an employment service that already requested a BCII criminal records check on the applicant, if the applicant was not disqualified by the disqualifying offenses of this rule and did not meet the personal character standards.)
 8. Disqualifying offenses.
 9. Personal character standards. (ODA's proposed substantial changes to the personal character standards is located in paragraphs (E)(1)(c) and (E)(1)(d) of the proposed new rule. ODA is proposing to make "repeat theft-related offense" includes multiple convictions of breaking and entering, theft, aggravated theft, grand theft, grand theft of a motor vehicle, unauthorized use of property--computer, cable, or telecommunications property, forgery, identification card offenses, and securing writings by deception. The current rule that ODA is proposing to replace (rule 173-41-01 of the Administrative Code) only prevents an employer from using personal character standards to hire an applicant who had multiple convictions of unauthorized use of a vehicle, passing bad checks, misuse of credit cards, Medicaid fraud, or recovering stolen property. ODA is also proposing to prevent an employer from using the personal character standards to hire an applicant who was convicted of a violent offense against a person with a disability. The current rule that ODA is proposing to replace prevents an employer from using personal character standards to hire an applicant was convicted of a violent offense against an older person, but not a person with a disability.)
 10. Pardons.
 11. Conditional employment.
 12. Records.
 13. Confidentiality.
 14. Penalties.
8. If the rule incorporates a text or other material by reference and the agency claims the incorporation by reference is exempt from compliance with sections

121.71 to 121.74 of the Revised Code because the text or other material is **generally available** to persons who reasonably can be expected to be affected by the rule, provide an explanation of how the text or other material is generally available to those persons:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

9. If the rule incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material electronically, provide an explanation of why filing the text or other material electronically was infeasible:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

10. If the rule is being **rescinded** and incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material, provide an explanation of why filing the text or other material was infeasible:

Not Applicable.

11. If **revising** or **refiling** this rule, identify changes made from the previously filed version of this rule; if none, please state so:

On January 5, 2009, ODA refiled this proposed new rule to:

1. Replace "Introduction: For each employer required under section 173.394 of the Revised Code to conduct a criminal records check on each applicant for a paid direct-care position, this rule implements requirements and processes regarding the records check" in paragraph (A) of the rule with "Introduction: This rule establishes the requirements and processes regarding a criminal records check for each employer required under section 173.394 of the Revised Code to conduct a check on any applicant for a paid direct-care position."

2. Replace "receiving or expecting to receive" in paragraph (B)(1) of the rule with "receiving, or expecting to receive,"

3. Delete "service that requires the applicant to have" in paragraph (B)(5) of the rule from the words "any service that requires the applicant to have access to a consumer's personal property or personal records" because the phrase has the same meaning without the extra words.

4. Insert the word "an" in between "or any employee of" and "agency" in paragraph (B)(6) of the rule.

5. Insert "No employer shall hire an applicant who fails to complete a form(s) and fingerprint impression sheet under paragraph (C)(4) of this rule. No employer shall hire an applicant who was convicted of a disqualifying offense, except under the standards of paragraph (E) of this rule" in paragraph (C)(1) of this rule after "Each employer and each applicant: Each employer shall request that BCII conduct a criminal records check on each applicant." This allows paragraph (C)(1) of the rule, the first paragraph to address the requirements in the rule, to state the gist of the criminal records check requirements.

6. Insert the words "for processing" after "Forward the completed form(s) and fingerprint impression sheet to BCII" in paragraph (C)(4)(b) of the rule and delete the words "before submitting the completed form(s) and fingerprint impression sheet for processing" from the end of the paragraph.

7. Delete "and also send the fee required by BCII (or arrange for payment in a method prescribed by BCII)" from paragraph (C)(4)(b) of the rule because the topic is covered by paragraph (C)(5)(a) of the rule.

8. Delete paragraph (C)(4)(c) of the rule, which said, "Only hire an applicant for a direct-care position if the applicant completes the form(s) and fingerprint impression sheet" and put the language into paragraph (C)(1) of the rule. Additionally, add an ""and" to the end of paragraph (C)(4)(a) and replace "; and," in paragraph (C)(4)(b) with a period.

9. Insert a hyphen between "employment" and "service" in paragraph (C)(6) of the rule.

10. Combine paragraphs (C)(6)(a) and (C)(6)(b) of the rule so that the paragraph says, "The employment service or the applicant provides the employer with a criminal records check report on the applicant that was conducted no more than one year before the applicant's referral and the criminal records check report demonstrates that the applicant was not convicted of a disqualifying offense; or, the report demonstrates that the applicant was convicted of a disqualifying offense, but the employer chooses to hire the applicant under paragraph (E) of this rule; or,"

11. Replace paragraph (C)(6)(b) with "The employment service or the applicant provides the employer with a letter from the employment service, that is on the employment service's letterhead, that is dated and signed by a supervisor or another designated official of the employment service, and that states that the employment service has requested a criminal records check on the applicant, that the requested criminal records check will include a determination of whether the applicant has been convicted of a disqualifying offense, that, as of the date set forth on the letter, the employment service had not received the criminal records check report, and that, when the employment service receives the report, it promptly will send a copy of it to the employer. If the employer employs an applicant conditionally under this paragraph, it shall also comply with the requirements for conditional employment

under paragraph (G) of this rule." This change implements division (I)(2) of section 173.394 of the Revised Code.

12. Replace the period at the end of paragraph (E)(1)(b) with a semicolon.

13. Replace the phrase, "'Repeat theft-related offense' means a subsequent offense by a person who has been convicted of the commission of any two theft-related offenses or a combination of any two theft-related offenses in two separate criminal actions" in paragraph (E)(1)(c) of the rule with, "'Repeat theft-related offense' means a theft-related offense by a person who was previously convicted of a theft-related offense, or the combination of multiple theft-related offenses in separate criminal actions." And, in the same paragraph, replace the phrase, "The employer shall consider two or more theft-related offenses as one offense if the offenses are connected with the same act or were committed at the same time" with "The employer shall consider multiple theft-related offenses as one offense if the offenses are connected with the same act or were committed at the same time."

14. Replace the colon at the end of paragraph (E)(1)(d) with, "; or,"

15. Update this RSFA, including the removal of budget line items "GRF-490-421 PACE," "GRF-490-506 National Senior Service Corps.," "and 3C4-490-621 PACE-Federal" from RSFA item #14.

12. 119.032 Rule Review Date:

(If the rule is not exempt and you answered NO to question No. 1, provide the scheduled review date. If you answered YES to No. 1, the review date for this rule is the filing date.)

NOTE: If the rule is not exempt at the time of final filing, two dates are required: the current review date plus a date not to exceed 5 years from the effective date for Amended rules or a date not to exceed 5 years from the review date for No Change rules.

FISCAL ANALYSIS

13. Estimate the total amount by which *this proposed rule* would **increase / decrease** either **revenues / expenditures** for the agency during the current biennium (in dollars): Explain the net impact of the proposed changes to the budget of your agency/department.

This will have no impact on revenues or expenditures.

\$0.00

ODA anticipates that the adoption of this proposed new rule will have no impact

upon the biennial budget established by the General Assembly for the agency.

14. Identify the appropriation (by line item etc.) that authorizes each expenditure necessitated by the proposed rule:

GRF-490-403 PASSPORT.

GRF-490-411 Senior Community Services.

GRF-490-412 Residential State Supplement.

GRF-490-414 Alzheimer's Respite.

GRF-490-416 JCFS Community Options.

GRF-490-422 Assisted Living Waiver.

322-490-618 Federal Aging Grants.

3C4-490-607 PASSPORT.

3C4-490-622 Assisted Living-Federal.

3M4-490-612 Federal Independence Services.

4J4-490-610 PASSPORT/Residential State Supplement.

4U9-490-602 PASSPORT Fund.

15. Provide a summary of the estimated cost of compliance with the rule to all directly affected persons. When appropriate, please include the source for your information/estimated costs, e.g. industry, CFR, internal/agency:

Non-substantial changes: ODA estimates that the non-substantial changes in this rule will have no impact upon the cost of compliance employers already face concerning criminal records checks. Am. Sub. H. B. No. 530 (126th G. A.) already requires any employer considering an applicant for a direct-care position to request a criminal records check on the applicant from BCII and only allows the employer to hire the applicant if the applicant is not disqualified under section 173.394 of the Revised Code or ineligible to be hired under personal character standards already adopted under rule 173-41-01 of the Administrative Code. The non-substantial changes do not change these facts.

Substantial changes concerning repeat-theft offenses and violent offenses: ODA estimates that any employer who is currently considering an applicant for a direct-care position who was convicted of repeat-theft offenses or a violent offense against a person with a disability may incur a cost of compliance if that employer

must spend administrative time searching for a new applicant because no other applicants are applying for the direct-care position who have not been convicted of repeat-theft offenses or a violent offense against a person with a disability. That is because ODA has changed the definitions of "repeat-theft offense" and "violent offense" in this proposed new rule. However, it seems unlikely that the pool of applicants would only contain persons convicted of repeat-theft offenses or a violent offense against a person with a disability.

Substantial change concerning consumer's personal records: ODA estimates that an employer may experience an increased cost of compliance if the employer considers applicants for positions of employment that would give the applicants access to consumers' personal records, but not to provide direct care in other ways. This is because ODA is proposing to expand the definition of "direct care" to include access to a consumer's personal records. Only a provider who considered applicants for direct-care positions that did not involve direct-care other than access to personal records, and who did not request a criminal records check on those employees who only have access to personal records, would experience an increased cost of compliance.

Fees are already required by statute: Although the above two paragraphs mention potential increased costs of compliance associated with the adoption of this proposed new rule for certain providers, in general, ODA estimates that the adoption of this proposed new rule will not create new costs. ODA is not creating a new fee. The proposed new rule implements section 173.394 of the Revised Code which, under division (D) of that section, already requires the employer to pay the fee for the criminal records check required by that section. Additionally, the fee is already part of the cost of doing business in ODA's programs. ODA's certified provider programs (e.g., PASSPORT) reimburse employers with all-inclusive rates that are intended to cover all costs associated with providing a service, including the administrative costs of requesting a criminal records check from BCII, paying the BCII's fee for the records check, and comparing the criminal records check report to this proposed new rule to see if the employer may hire an applicant. Employers in ODA's programs for non-certified providers competitively bid for a provider agreement, and, in doing so, tell their area agency on aging how much it will cost them to operate a program, including the aforementioned administrative costs. If the non-certified provider's bid wins a competition, the non-certified provider will be reimbursed for the amount the provider said his/her costs would be.

Applicants: ODA estimates that an applicant may experience a cost of compliance associated with the adoption of this proposed new rule because section 173.394 of the Revised Code allows the employer to pass the cost of the BCII records check request on to the consumer.

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **No**

17. Does this rule deal with environmental protection or contain a component dealing with environmental protection as defined in R. C. 121.39? **No**