

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

Agency Name

Division

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173-9-07

Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

**Disqualifying offense exclusionary periods; limited
grandfathering; certificates; pardons.****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? **Yes**

Bill Number: **HB487**General Assembly: **129**Sponsor: **Amstutz (by
request)**

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: **173.01, 173.02, 173.27, 173.391, 173.392, 173.394; Sections 305(a)(1)(C) and 712(a)(5)(D) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006; 45 C.F.R. 1321.11 (10/01/2011 edition)**

5. Statute(s) the rule, as filed, amplifies or implements: **173.27, 173.394; 42 C.F.R. 460.68(a), 460.71(a)(1), and 460.71(a)(2) (10/01/2011 edition)**

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

As ODA outlined on the public hearing notice, this rule proposal is part of a larger, multi-agency rules project that has multiple goals:

On December 21, 2011, Attorney General Mike DeWine wrote the following to ODA and other state agencies: "[I]t is paramount to the safety of ... vulnerable citizens that we prohibit certain types of criminals from entering into patients' homes." He also said, "I urge you to work together to create one set of comprehensive rules in a manner that eliminates loopholes and provides full protection to Ohio's most vulnerable citizens." In Greg Moody's response, he said, "These efforts will align with broader OHT initiatives to assure the safety and quality of home and community based services that are critical to health transformation in Ohio." In response, the Ohio General Assembly enacted, in H.B.487 (129th G.A.), amendments to sections 173.27 and 173.394 of the Revised Code to require ODA to adopt rules to implement the sections.

Section 751.31 of H.B.487 required ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services to "[m]ake the policies established by the rules as similar as possible." Thus, one of the goals of this project is for the four state agencies to adopt rules similar to one another. Because many providers furnish services for more than one, if not all four, state agencies' programs, this would not only provide the same level of protection to the consumers of each state agency's programs, but also reduce the administrative burden that providers face when working with multiple state agencies. The intent is as follows: For all programs affected by this rule project, if a provider complies with one state agency's rules, the provider has complied with the other three state agencies' rules, too.

H.B.487 either required or authorized the four state agencies to adopt changes into the criminal records check rules, including: (1) The proposed new rules would continue to require applicants under final consideration for employment to undergo criminal records checks. With certain exemptions, the new rules would also require criminal records checks on the employees after they are hired. (2) The list of disqualifying offenses increased for three of the four state agencies. For ODA's programs, the list of disqualifying offenses increased from 55 to 129 [S.B.337 increased this to 130]. (3) As a replacement to the subjective "personal character standards" found in the current versions of each state agency's rules, this proposed new rules lists each disqualifying offense found into one of five tiers. The tiers determine how long a person with a conviction for each offense is barred from providing ombudsman services or direct care. (4) The rules explain that the certificates created under H.B.86 (129th G.A.) and S.B.337 (129th G.A.) may allow, under certain circumstances, for an applicant or employee to provide services under our programs even if the applicant or employee has a disqualifying criminal record. (5) The rules require checking free databases that may also indicate an applicant or employee is disqualified before paying for a criminal records check

on the same applicant or employee.

H.B.487's amendments to sections 173.27 and 173.394 of the Revised Code considerably lengthened the amount of material to cover in rules on criminal records checks. To make the rules easier to follow, ODA is proposing to: (1) Break what would have been a giant rule into smaller, one-topic rules. (2) Make the title of each rule the topic of the rule. (3) Arrange the rule topics in an order that is comparable to the Dept. of Health's proposed new rules. This would make proposed new rule 173-9-01 of the Administrative Code comparable to proposed new rule 3701-60-01 of the Administrative Code, proposed new rule 173-9-05 of the Administrative Code comparable to proposed new rule 3701-60-05 of the Administrative Code, and so on.

ODA is proposing to no longer duplicate the rule(s) for the ombudsman program. Instead, ODA now calls the entity responsible for conducting the check the "responsible entity" instead of the employer or the state long-term care ombudsman. The term "responsible entity" is a universal term that ODA uses throughout the proposed new rules. It applies to the ombudsman program and also various types of direct-care providers (e.g., agencies, self-employed, consumer-directed). For comparison, section 5123.081 of the Revised Code uses the term "responsible entity" and a universal term that applies to the many responsible entities for the Dept. of Developmental Disabilities' criminal records check requirements.

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:

In this proposed new rule, ODA sets forth the criteria for how a responsible entity may be able to hire certain applicants and retain certain employees for positions to provide ombudsman services or direct care even if the applicant's or employee's criminal record lists a disqualifying offense.

ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services are proposing to adopt identical criteria to the material in this proposed new rule.

As a replacement to the subjective "personal character standards" found in the current versions of rules 173-9-01 and 173-14-14 of the Administrative Code, this proposed new rule lists each disqualifying offense found in proposed new rule 173-9-06 of the Administrative Code into one of five tiers. The tiers determine how long a person with a conviction for each offense is barred from providing ombudsman services or direct care.

Tier I offenses require a permanent bar.

Tier II offenses require a 10-year bar. If the person has multiple disqualifying offenses, of which at least one falls under Tier II, the person is barred for 15 years.

Tier III offenses require a 7-year bar. If the person has multiple disqualifying offenses, of which at least one falls under Tier III, the person is barred for 10 years.

Tier IV offenses require a 5-year bar. If the person has multiple disqualifying offenses, of which at least one falls under Tier IV, the person is barred for 7 years. A drug possession offense fits into this tier unless it is a minor drug possession offense.

Tier V offenses do not bar a person from employment. A minor drug possession offense fits into this tier.

The proposed new rule incorporates the new Certificates of Qualification for Employment created by S.B.337 (129th G.A.). A common pleas court with competent jurisdiction may grant such a certificate to an applicant or employee to declare that an employer may employ the applicant or employee even if this rule would, otherwise, forbid the employment because the person has a criminal conviction that falls into Tiers II through IV.

The proposed new rule incorporates the new Certificates of Achievement and Employability created by H.B.86 (129th G.A.). The Dept. of Rehabilitations and Corrections may grant such a certificate to an applicant or employee to declare that an employer may employ the applicant or employee even if this rule would, otherwise, forbid the employment because the person has a criminal conviction that falls into Tiers II through IV.

Just as in the current versions of rules 173-9-01 and 173-14-14 of the Administrative Code, the proposed new rule makes exceptions to disqualifications for those with pardons.

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:

The U.S. Administration on Aging publishes the Older Americans Act of 1965, as amended in 2006, on this page of their website:
http://www.aoa.gov/AOARoot/AoA_Programs/OAA/oa_full.asp.

The sections of the Code of Federal Regulations that ODA cites at the end of this rule are generally available on this page of the U.S. Government Printing Office website:

<http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>

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:

In the statutory-authority section at the end of the rule, ODA cites two sections of the Older Americans Act (and the United States Code) and one section of the Code of Federal Regulations that give ODA rule-making authority as the state unit on aging. ODA does not incorporate the text of those sections because (1) they merely give ODA rule-making authority and (2) section 121.75 of the Revised Code allows ODA to not incorporate the text of the regulations because the federal government publishes the text of the federal regulations and, thus, the federal regulations are readily available to the public. (Cf., The Joint Committee on Agency Rule Review (JCARR). "Procedures Manual." Revised, October 1, 2012. Pp., 22-23.)

In the rule-amplifies section at the end of the rule, ODA cites three sections of the Code of Federal Regulations that address the criminal records check requirements for PACE, which Chapter 173-9 amplifies. Section 121.75 of the Revised Code allows ODA to not incorporate the text of the regulations because the federal government publishes the text of the federal regulations and, thus, the federal regulations are readily available to the public.

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. If applicable, indicate each specific paragraph of the rule that has been modified:

On November 6, 2012, ODA made further improvements to five of the proposed new rules in this rule package after the CSI Office's review of the rules. ODA's improvements should have no impact upon the adverse impact that the rules may cause to Ohio businesses. ODA made these improvements with the knowledge and approval of the CSI Office. The changes to proposed new rule 173-9-07 of the Administrative Code involve:

1. Replacing "aggravated robbery" as the description of the crime created under section 2909.02 of the Revised Code in paragraph (A)(2)(a)(ix) of the rule with "aggravated arson."

2. Inserting the crime created under section 2925.141 of the Revised Code (illegal use or possession of marihuana drug paraphernalia) under paragraph (A)(5) of the rule [Tier V]. S.B.337 created this new offense and added it to the list of disqualifying offenses in section 109.572 of the Revised Code after the passage of H.B.487.

3. Inserting a new paragraph into the rule regarding limited grandfathering. The paragraph allows "[a] responsible entity [to] choose to continue to employ an employee to provide ombudsman services or direct care who is otherwise excluded from employment to provide ombudsman services or direct care because the employee was convicted of, or pleaded guilty to, an offense(s) listed under paragraph (A)(4) [Tier IV] of this rule, but only if: (1) The responsible entity hired the employee before January 1, 2013; (2) The employee's conviction or guilty plea occurred before January 1, 2013; and, (3) the Responsible entity has considered the nature and seriousness of the offense(s), and attests in writing before April 1, 2013, to the character and fitness of the employee based upon the employee's demonstrated work performance."

4. Revising this RSFA.

5. Revising ODA's memorandum of response to the CSI Office.

On November 15, 2012, JCARR staff encouraged ODA to enhance the citations of federal laws and codes in ODA's rules. In response, on November 20, 2012, ODA revised the rule to:

1. Add the following to the citations of the Older Americans Act of 1965 in the statutory-authority section at the end of the rule: "as amended in 2006."

2. Add the following to the citations of the Code of Federal Regulations in the statutory-authority and rule-amplifies sections at the end of the rule: "(10/01/2011 edition)."

3. Revise this RSFA.

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 estimates that the rule project of which this rule proposal is a part will have no impact upon the biennial budget that the Ohio General Assembly established for ODA in H.B.153 (129th G.A.) and modified in H.B.487 (129th G.A.). The same can be said for the biennial budget for PACE and the Assisted Living, Choices, and PASSPORT Programs, which are administered by ODA, but draw from the line item GRF-600-525, which the General Assembly appropriated to the Department of Job and Family Services.

ODA does not have authority to spend in excess of what the General Assembly appropriated to ODA and the General Assembly had the changes to criminal records checks in mind when they both adjusted ODA's budget and reformed criminal records checks in H.B.487.

Having said this, it is helpful to note that the proposed new rules would necessitate that more of the funds that the General Assembly appropriated to ODA be spent on administrative functions regarding checking criminal records. These functions are: (1) requiring certain staff of area agencies on aging and PASSPORT administrative agencies to undergo criminal records checks as employees (i.e., after they are hired) and (2) requiring paid personnel who perform ombudsman services to do the same. In short, ODA, area agencies on aging, PASSPORT administrative agencies, and regional long-term ombudsman offices will perform the new checks with the funding that each agency has already received.

ODA estimates that the proposed new rules will not, however, create a new cost of compliance associated with monitoring providers for compliance. If ODA, an area agency on aging, or a PASSPORT administrative agency check a provider's personnel files to see if the provider complied with the criminal records check rules, the relevant record to check is the latest criminal record report on file, not historical criminal records reports. Thus, after the rules would take effect in 2013, one look into one file should take the same amount of time as it currently takes in 2012. Additionally, the new exclusionary periods should be easier to monitor than the subjective personal character standards which may have required court records or testimony to verify. (e.g., "Was the crime sexually motivated?")

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

3220-490-618 Federal Aging Grants.

GRF-490-410 Long-Term Care Ombudsman.

GRF-490-411 Senior Community Services.

GRF-490-414 Alzheimer's Respite.

GRF-600-525 Health Care/Medicaid (State and Federal).

3C40-490-623 Long-Term Care Budget.

3M40-490-612 Federal Independence Services.

4C40-490-609 Regional Long-Term Care Ombudsman Program.

5BA0-490-620 Ombudsman Support.

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:

ODA estimates that the rule project of which this rule proposal is a part will create no cost of compliance for any consumer.

ODA estimates that the rule project of which this rule is a part will create (1) a new cost of compliance for providers who, beginning on January 1, 2013, would be required to comply with a new set of criteria to determine if a person's criminal record disqualifies him or her from providing direct care; and (2) a new cost of compliance for providers who, beginning on January 1, 2013, would be required to check the criminal records of current employees (i.e., after they are hired) on a phased-in schedule. For more information, please see the details in the 52-page business impact analysis that accompanies this rule filing.

ODA estimates that the rule project of which this rule is a part will create new expenses for the ombudsman program and for administrative duties in area agencies on aging and PASSPORT administrative agencies. Because these expenses are directly paid with state funds, details are provided in item 13 of this RSFA instead of item 15.

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**

S.B. 2 (129th General Assembly) Questions

18. Has this rule been filed with the Common Sense Initiative Office pursuant to R.C. 121.82? **Yes**

19. Specific to this rule, answer the following:

A.) Does this rule require a license, permit, or any other prior authorization to engage in or operate a line of business? **No**

B.) Does this rule impose a criminal penalty, a civil penalty, or another sanction, or create a cause of action, for failure to comply with its terms? **No**

(See proposed new rule 173-9-10 of the Administrative Code.)

C.) Does this rule require specific expenditures or the report of information as a condition of compliance? **No**

(See proposed new rule 173-9-08 of the Administrative Code.)