

5101:3-45-07

Ohio home care waiver, transitions DD waiver and transitions carve-out waiver programs: Criminal records checks involving agency providers.

(A) Unless otherwise stated in paragraphs (A)(1) and (A)(2) of this rule, this rule sets forth the process and requirements for the criminal records checks of persons under final consideration for employment with a waiver agency, and existing employees with a waiver agency in a full-time, part-time or temporary position, and who are providing home and community-based services (HCBS) in an Ohio home care waiver, transitions DD waiver and/or transitions carve-out waiver. This rule does not apply to:

- (1) Any individual who is subject to a database review or a criminal records check under section 3701.881 of the Revised Code and rules adopted thereunder.
- (2) Applicants and employees of a waiver agency that is also a community-based long term care agency who are subject to database reviews and criminal records checks in accordance with section 173.394 of the Revised Code and rules adopted thereunder.

(B) For the purposes of this rule,

- (1) "Applicant" means a person who is under final consideration for employment with a waiver agency in a full-time, part-time or temporary position, that involves providing HCBS.
- (2) "Chief administrator" means the head of a waiver agency, or his or her designee.
- (3) "Community-based long term care agency" has the same meaning as in section 173.39 of the Revised Code.
- (4) "Criminal records check" has the same meaning as in section 109.572 of the Revised Code.
- (5) "Department" means the Ohio ~~office of medical assistance~~ department of medicaid (OMAODM).
- (6) "Disqualifying offense" means any of the following:
 - (a) A violation of section 959.13, 959.131, 2903.01, 2903.02, 2903.03, 2903.04, 2903.041, 2903.11, 2903.12, 2903.13, 2903.15, 2903.16, 2903.21, 2903.211, 2903.22, 2903.34, 2903.341, 2905.01, 2905.02,

2905.05, 2905.11, 2905.12, 2905.32, 2905.33, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.24, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2907.33, 2909.02, 2909.03, 2909.04, 2909.22, 2909.23, 2909.24, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2913.02, 2913.03, 2913.04, 2913.05, 2913.11, 2913.21, 2913.31, 2913.32, 2913.40, 2913.41, 2913.42, 2913.43, 2913.44, 2913.441, 2913.45, 2913.46, 2913.47, 2913.48, 2913.49, 2913.51, 2917.01, 2917.02, 2917.03, 2917.31, 2919.12, 2919.121, 2919.123, 2919.22, 2919.23, 2919.24, 2919.25, 2921.03, 2921.11, 2921.12, 2921.13, 2921.21, 2921.24, 2921.32, 2921.321, 2921.34, 2921.35, 2921.36, 2921.51, 2923.12, 2923.122, 2923.123, 2923.13, 2923.161, 2923.162, 2923.21, 2923.32, 2923.42, 2925.02, 2925.03, 2925.04, 2925.041, 2925.05, 2925.06, 2925.09, 2925.11, 2925.13, 2925.14, 2925.141, 2925.22, 2925.23, 2925.24, 2925.36, 2925.55, 2925.56, 2927.12 or 3716.11 of the Revised Code, felonious sexual penetration in violation of former section 2907.12 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996; or

- (b) A violation of section 2923.01, 2923.02, or 2923.03 of the Revised Code when the underlying offense that is the object of the conspiracy, attempt, or complicity is one of the offenses listed in paragraph (B)(6)(a) of this rule; or
 - (c) A violation of an existing or former municipal ordinance or law of the state of Ohio, any other state, or the United States that is substantially equivalent to any of the disqualifying offenses as set forth in paragraph (B)(6)(a) or (B)(6)(b) of this rule.
- (7) "Employee" means a person employed by a waiver agency in a full-time, part-time, or temporary position that involves providing HCBS.
- (8) "Home and community-based services medicaid waiver component" has the same meaning as in section 5111.85 of the Revised Code. For the purposes of this rule, "home and community-based services medicaid waiver component" is interchangeable with Ohio home care waiver, transitions DD waiver and/or transitions carve-out waiver.
- (9) "Waiver agency" means a person or government entity that provides HCBS under an Ohio home care waiver, transitions DD waiver or transitions carve-out waiver, other than such a person or government entity that is certified under the medicare program. "Waiver agency" does not mean an independent provider as defined in section 5111.034 of the Revised Code or rule 5101:3-45-08 of the Administrative Code.

(C) No waiver agency shall employ an applicant or continue to employ an employee in a position that involves providing HCBS in an Ohio home care waiver, transitions DD waiver or transitions carve-out waiver if the applicant or employee:

(1) Is included on one or more of the following databases:

- (a) The system for award management (SAM) maintained by the United States general services administration;
- (b) The list of excluded individuals and entities maintained by the office of inspector general in the United States department of health and human services pursuant to section 1128 of the "Social Security Act," 94 Stat. 2619 (1980), 42 U.S.C. 1320a-7, as amended, and section 1156 of the "Social Security Act," 96 Stat. 388 (1982), 42 U.S.C. 1320c-5, as amended;
- (c) The Ohio department of developmental disabilities (DODD) online abuser registry established under section 5123.52 of the Revised Code;
- (d) The internet-based sex offender and child-victim offender database established under division (A)(11) of section 2950.13 of the Revised Code;
- (e) The internet-based database of inmates established under section 5120.66 of the Revised Code; or
- (f) Is included on the state nurse aide registry established under section 3721.32 of the Revised Code, and there is a statement detailing findings by the director of health that the applicant or employee neglected or abused a long-term care facility or residential care facility resident or misappropriated property of such a resident.

(2) Fails to:

- (a) Submit to a criminal records check conducted by the bureau of criminal identification and investigation (BCII), including failing to access, complete and forward to the superintendent the form or the standard fingerprint impression sheet; or
- (b) Instruct the superintendent of BCII to submit the completed report of the criminal records check directly to the chief administrator of the waiver

agency.

- (3) Except as provided for in paragraphs (F) and (G) of this rule, the applicant or employee has been convicted of, or pleaded guilty to, a disqualifying offense, regardless of the date of the conviction or date of entry of the guilty plea.

(D) Process for conducting criminal records checks.

- (1) At the time of each applicant's initial application for employment in a position that involves providing HCBS in an Ohio home care waiver, transitions DD waiver or transitions carve-out waiver, the chief administrator of the waiver agency shall conduct a review of the databases listed in paragraph (C)(1) of this rule to determine whether the waiver agency is prohibited from employing the applicant in that position. The chief administrator of the waiver agency shall provide the applicant with a copy of any disqualifying information disclosed in the review of the databases.
- (2) Except as otherwise noted in paragraph (C)(1) of this rule, the chief administrator of a waiver agency shall require each applicant to request that the BCII superintendent conduct a criminal records check with respect to the waiver agency applicant, and pursuant to sections 109.572 and 5111.033 of the Revised Code. The applicant must provide a set of fingerprint impressions as part of the criminal records check.
 - (a) If an applicant does not present proof of having been a resident of the state of Ohio for the five-year period immediately prior to the date the criminal records check is requested, or provide evidence that within that five-year period the superintendent has requested information about the applicant from the federal bureau of investigation (FBI) in a criminal records check, the chief administrator shall require the applicant to request that the superintendent obtain information from the FBI as part of the criminal records check.
 - (b) Even if an applicant presents proof of having been a resident of the state of Ohio for the five-year period, the chief administrator may require the applicant to request that the superintendent obtain information from the FBI in the criminal records check.
- (3) The chief administrator of a waiver agency shall provide the following to each applicant for whom a criminal records check is required by this rule:
 - (a) Information about accessing, completing and forwarding to the

superintendent the form prescribed pursuant to division (C)(1) of section 109.572 of the Revised Code and the standard fingerprint impression sheet presented pursuant to division (C)(2) of that section; and

- (b) Written notification that the applicant is to instruct the superintendent to submit the completed report of the criminal records check directly to the chief administrator of the waiver agency.

(4) Conditional employment.

- (a) A waiver agency may conditionally employ an applicant for whom a criminal records check is required by this rule prior to obtaining the results of that check, provided that the waiver agency has conducted a review of the databases listed in paragraph (C)(1) of this rule and has determined the waiver agency is not prohibited from employing the applicant in that position. The chief administrator must require the applicant to request a criminal records check no later than five business days after he or she begins conditional employment.

- (b) The waiver agency shall terminate conditional employment if the results of the criminal records check request, other than the results of any request for information from the FBI, are not obtained within sixty days of the criminal records check request.

- (5) If the results of the criminal records check indicate that the individual has been convicted of, or has pleaded guilty to any of the disqualifying offenses set forth in paragraph (B)(6) of this rule, and regardless of the date of conviction or the date of entry of the guilty plea, then the waiver agency shall either:

- (a) Terminate his or her employment; or

- (b) Choose to employ the individual because he or she meets the conditions set forth in paragraph (F) of this rule.

- (6) If the waiver agency determines that two or more convictions or guilty pleas result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction or guilty plea.

- (7) Termination of employment shall be considered just cause for discharge for the purposes of division (D)(2) of section 4141.29 of the Revised Code if the

individual makes any attempt to deceive the waiver agency about his or her criminal record.

- (8) A waiver agency shall pay to BCII the fee prescribed pursuant to division (C)(3) of section 109.572 of the Revised Code for any criminal records check required by this rule. However, a waiver agency may require an applicant to pay to BCII the fee for a criminal records check of the applicant. If the waiver agency pays the fee for an applicant, it may charge the applicant a fee not exceeding the amount the waiver agency pays to BCII pursuant to this rule if the waiver agency notifies the applicant at the time of application for employment of the amount of the fee and that, unless the fee is paid, he or she will not be considered for employment.
- (9) Reports of any criminal records checks conducted by BCII in accordance with this rule are not public records for the purposes of section 149.43 of the Revised Code and shall not be made available to any person other than the following:
- (a) The person who is the subject of the criminal records check or the individual's representative;
 - (b) The chief administrator of the waiver agency that requires the applicant to request the criminal records check or the administrator's representative;
 - (c) The director of ~~OMA~~ODM and the staff of the department who are involved in the administration of the Ohio medicaid program;
 - (d) The director of ODA or the director's designee if the waiver agency also is a community-based long-term care agency; ~~and~~
 - (e) An individual who receives, or may receive, waiver services from the person who is the subject of the criminal records check; and
 - ~~(e)~~(f) Any court, hearing officer or other necessary individual involved in a case dealing with a denial of employment of the applicant or termination of the employee; employment or unemployment benefits of the applicant or employee; or a civil or criminal action regarding the Ohio medicaid program.
- (E) As a condition of continuing to employ an individual in a position that involves providing HCBS in the Ohio home care waiver, transitions DD waiver or transitions carve-out waiver, the chief administrator of the waiver agency shall conduct a criminal records check of that employee at least once every five years

according to one of the following three schedules set forth in paragraphs (E)(1) to (E)(3) of this rule. The chief administrator shall follow the same process set forth in paragraphs (D)(1) to (D)(9) of this rule.

- (1) If the chief administrator of the waiver agency hired the employee before January 1, 2008, the chief administrator shall conduct a criminal records check of the employee no later than thirty days after the 2013 anniversary of the employee's date of hire and no later than thirty days after each anniversary date every five years after 2013.
 - (2) If the chief administrator of the waiver agency hired the employee on or after January 1, 2008, the chief administrator shall conduct a criminal records check of the employee no later than thirty days after the fifth anniversary of the employee's date of hire and no later than thirty days after each anniversary date every five years after the first fifth-year anniversary.
 - (3) The chief administrator of the waiver agency may conduct a criminal records check on any employee more frequently than every five years without any need to conduct a criminal records check according to the schedules set forth in paragraphs (E)(1) and (E)(2) of this rule.
- (F) A waiver agency may choose to employ an applicant or continue to employ an employee who has been convicted of, or has pleaded guilty to, a disqualifying offense set forth in paragraph (B)(6) of this rule if:
- (1) The applicant or employee has satisfied the conditions associated with the exclusionary periods set forth in rule 5101:3-45-11 of the Administrative Code; or
 - (2) The applicant or employee has obtained a certificate of qualification for employment issued by a court of common pleas with competent jurisdiction pursuant to section 2953.25 of the Revised Code, and in accordance with rule 5101:3-45-11 of the Administrative Code; or
 - (3) The applicant or employee has obtained a certificate of achievement and employability in an HCBS-related field, issued by the Ohio department of rehabilitation and corrections pursuant to section 2961.22 of the Revised Code, and in accordance with rule 5101:3-45-11 of the Administrative Code; and
 - (4) The applicant or employee has agreed, in writing, to have the waiver agency inform each potential consumer of the disqualifying offense, and has

acknowledged, in writing, that the potential consumer has the right to select or reject to receive services from the applicant or employee, prior to commencing service delivery.

(G) A waiver agency may choose to continue to employ an employee who is otherwise excluded by paragraph (B)(6) of this rule if:

- (1) The offense is a tier IV offense as set forth in paragraph (F) of rule 5101:3-45-11 of the Administrative Code;
- (2) The employee was hired prior to January 1, 2013;
- (3) The conviction or guilty plea occurred prior to January 1, 2013; and
- (4) The waiver agency has considered the nature and seriousness of the offense(s), and attests in writing prior to April 1, 2013, to the character and fitness of the employee based on their demonstrated work performance. The required written attestation shall be maintained in the employee's personnel record.

(H) Pardons.

A conviction of, or a plea of guilty to, an offense as set forth in paragraph (B)(6) of this rule shall not prevent an agency from considering an applicant for employment or an employee for continued employment if any of the following circumstances apply:

- (1) The applicant or employee has been granted an unconditional pardon for the offense pursuant to Chapter 2967. of the Revised Code;
- (2) The applicant or employee has been granted an unconditional pardon for the offense pursuant to an existing or former law of the state of Ohio, any other state, or the United States, if the law is substantially equivalent to Chapter 2967. of the Revised Code;
- (3) The applicant or employee has been granted a conditional pardon for the offense pursuant to Chapter 2967. of the Revised Code, and the condition(s) under which the pardon was granted have been satisfied; or
- (4) The applicant's or employee's conviction or guilty plea has been set aside pursuant to law.

- (I) Documentation of compliance. Each waiver agency shall maintain a roster of applicants and employees, accessible by the director, which includes, but is not limited to:
- (1) The name of each applicant and employee;
 - (2) The date the applicant or employee started work;
 - (3) The date the criminal records check request is submitted to BCII;
 - (4) The date the criminal records check is received; and
 - (5) A determination of whether the results of the check revealed that the applicant or employee committed a disqualifying offense(s).

Effective:

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Certification

Date

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