

5101:3-45-07

**ODJFS-administered waiver program: Criminal records checks involving agency providers.**

(A) 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 ODJFS-administered waiver.

(B) For the purposes of this rule,

(1) "Applicant" means a person who is under final consideration for employment or, after the effective date of section 5111.033 of the Revised Code (September 26, 2003), an existing employee, with a waiver agency in a full-time, part-time or temporary position, that involves providing HCBS to a person with disabilities.

(2) "Chief administrator" means the head of a waiver agency, or his or her designee.

(3) "Criminal records check" means any criminal records check conducted by the superintendent of the bureau of criminal identification and investigation (BCII) in accordance with section 109.572 of the Revised Code.

(4) "Department" means the Ohio department of job and family services (ODJFS) or its designee.

(5) "Disqualifying offense" means any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.041, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.05, 2905.11, 2905.12, 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, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2913.02, 2913.03, 2913.04, 2913.11, 2913.21, 2913.31, 2913.40, 2913.43, 2913.47, 2913.48, 2913.49, 2913.51, 2917.11, 2919.12, 2919.22, 2919.24, 2919.25, 2921.13, 2921.36, 2923.02, 2923.12, 2923.13, 2923.161, 2923.32, 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.14, 2925.22, 2925.23 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, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date; or

(b) An existing or former 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)(5)(a) of this rule.

(6) "Home and community-based services" (HCBS) refers to the services as set forth in division (A)(4) of section 5111.033 of the Revised Code.

(7) "Superintendent" means superintendent of BCII.

(8) "Waiver agency" means a person or government entity that is not certified under the medicare program and is accredited by the community health accreditation program (CHAP) or the joint commission on accreditation of health care organizations (JCAHO), or a company that provides HCBS to persons with disabilities through ODJFS-administered waiver programs.

(C) Process for conducting criminal records checks.

(1) The chief administrator of a waiver agency shall require each person, at the time of initial application for a position that involves providing HCBS to a person with a disability, to provide a set of fingerprint impressions and that a criminal records check must be conducted if the person comes under final consideration for employment.

(2) An employee of a waiver agency in a full-time, part-time or temporary position that involves providing HCBS to a person with disabilities shall comply with this rule within sixty days after the effective date of this rule unless he or she:

(a) Previously was the subject of a criminal records check relating to that position; and

(b) Has been continuously employed in that position since that criminal records check was conducted.

(3) Except as otherwise noted in paragraph (C)(2) 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 ODJFS-administered waiver agency provider applicant, and pursuant to sections 109.572, 5111.033 and 5111.034 of the Revised Code.

(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), the chief administrator shall require the applicant to request that the superintendent obtain a criminal records check from the FBI.

(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.

(4) 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.

(5) An applicant given information and notification pursuant to paragraph (C)(4) of this rule who fails to access, complete and forward to the superintendent the form or the standard fingerprint impression sheet, or who fails to instruct the superintendent to submit the completed report of the criminal records check directly to the chief administrator shall not be employed in any position in a waiver agency for which a criminal records check is required by this rule.

(6) 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 shall require the applicant to request a criminal records check not 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 the period ending sixty days after the date the request is made.

(c) Regardless of when the results are obtained, if they indicate that the individual has been convicted of, has pleaded guilty to, or has been found eligible for intervention in lieu of conviction for any of the offenses set forth in paragraph (B)(5) of this rule, then the waiver agency:

(i) Shall terminate his or her employment; or

(ii) May choose to employ him or her because he or she meets all of the conditions set forth in paragraph (D) of this rule.

(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) Each waiver agency or applicant shall pay to BCII the fee prescribed pursuant to division (C)(3) of section 109.572 of the Revised Code for each criminal records check conducted pursuant to the waiver agency's or applicant's request.

(a) Each waiver agency or applicant shall pay a fee not to exceed the amount the waiver agency or applicant pays in accordance with this paragraph; and

(b) If a waiver agency pays the fee, it may charge the applicant a fee not to exceed that which the agency pays pursuant to paragraph (C)(10)(a) of this rule. The waiver agency shall only collect fees if the waiver agency notifies the person 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 requesting the criminal records check or the administrator's representative;

(c) An administrator at the department; and

(d) Any court, hearing officer or other necessary individual involved in a case dealing with a denial of employment of the applicant, or dealing with employment or unemployment benefits of the applicant.

(D) Conditions and factors used to evaluate an applicant's personal character.

(1) If an applicant has been convicted of, has pleaded guilty to, or has been found eligible for intervention in lieu of conviction of only one of the disqualifying offenses set forth in paragraph (B)(5) of this rule, a waiver agency may employ the applicant if all of the following conditions are met:

(a) The disqualifying offense was not perpetrated against an individual under

the age of eighteen or age sixty or older, or an individual of any age with disabilities;

(b) The applicant is not a repeat violent offender;

(c) The disqualifying offense is not a sex offense as set forth in Chapter 2907. of the Revised Code;

(d) The disqualifying offense is not abuse or neglect as set forth in section 2903.34 of the Revised Code;

(e) The disqualifying offense is not aggravated murder as set forth in section 2903.01 of the Revised Code;

(f) The disqualifying offense is not murder as set forth in section 2903.02 of the Revised Code;

(g) The disqualifying offense is not voluntary manslaughter as set forth in section 2903.03 of the Revised Code;

(h) The disqualifying offense is disorderly conduct, and the conviction was not based upon an original complaint or indictment involving one of the violent offenses set forth in paragraph (B)(5) of this rule;

(i) Five years have passed since the applicant was fully discharged from imprisonment, probation and/or parole for the disqualifying offense, and the disqualifying offense was not related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct involving a federal or state-funded program; and

(j) The applicant agrees, in writing, to have the waiver agency inform each potential consumer of the disqualifying offense prior to commencing service delivery.

(2) Before hiring an applicant who meets the conditions set forth in paragraph (D)

(1) of this rule, the waiver agency shall consider all of the following additional factors to determine whether or not it is likely that the applicant will commit another disqualifying offense:

(a) The duties and responsibilities of the position, and the extent to which the position being filled provides an opportunity for the commission of the same or similar offenses;

(b) The extenuating circumstances under which the offense was committed, including but not limited to:

(i) The applicant's age at the time of the offense;

(ii) The age and ability of the victim;

(c) The amount of time that has lapsed since the applicant was fully discharged from imprisonment, probation and parole;

(d) Whether the applicant has made efforts at rehabilitation, and the results of those efforts;

(e) Whether any criminal proceedings are pending against the applicant;

(f) A conviction listed on the report of the criminal records check that identifies any offenses contained in the Revised Code that are not as set forth in paragraph (B)(5) of this rule, if the crime bears a direct and substantial relationship to the duties and responsibilities of the position being filled; and

(g) Any other factors that are relevant to the performance of the job duties.

(E) Pardons.

A conviction of, or a plea of guilty to, an offense as set forth in paragraph (B) (5) of this rule shall not prevent an agency from considering an applicant for employment if any of the following circumstances apply:

(1) The applicant has been granted an unconditional pardon for the offense pursuant to Chapter 2967. of the Revised Code

(2) The applicant 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 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 conviction or guilty plea has been set aside pursuant to law.

(F) Documentation - applicant log.

(1) The chief administrator of a waiver agency shall maintain an applicant log separate from the personnel record. It shall contain the following information

(a) Names of all applicants;

(b) The date of application;

- (c) The date the applicant started work;
  - (d) The date the criminal records check request was submitted to BCII;
  - (e) The type(s) of criminal records checks required (i.e., BCII, FBI or both);
  - (f) The date of the BCII and/or FBI report;
  - (g) The date the BCII and FBI checks were received by the waiver agency;
  - (h) Whether or not the results of the check revealed that the applicant committed a disqualifying offense(s), and the specific offense(s) and date(s) committed;
  - (i) The number of references received on behalf of the applicant, the dates that the references were received, and how the references were verified;
  - (j) Whether the conditions and factors set forth in paragraph (D) of this rule were applied as a condition for employment; and
  - (k) Whether or not the applicant was conditionally hired, hired and/or terminated.
- (2) The chief administrator of a waiver agency shall certify in the applicant log that the waiver agency has considered and applied the conditions and factors set forth in paragraph (D) of this rule when hiring an applicant whose criminal background check results reveal the commission of a disqualifying offense as set forth in paragraph (B)(5) of this rule.

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Certification

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