

TO BE RESCINDED

5122-33-28

Background investigations for employment.

(A) The purpose of this rule is to establish procedure for conducting criminal records checks for owners, operators, prospective operators, managers, staff, and other individuals who, if employed by a residential facility, would have unsupervised access to facility residents.

(B) Definitions.

- (1) "Applicant" means a person who is under final consideration for employment with a residential facility.
- (2) "Criminal records check" has the same meaning as is section 109.572 of the Revised Code.
- (3) "Department" means the Ohio department of mental health and addiction services.
- (4) "Direct services position" means an employment position in which the employee has the opportunity to be alone with or exercises supervision or control over one or more individuals.
- (5) "Disqualifying offense" means any of the offenses listed or described in divisions (A)(3)(a) to (A)(3)(e) of section 109.572 of the Revised Code.
- (6) "Employee" means a person employed in a direct services position by a residential facility.
- (7) "Individual" means a resident of a residential facility.
- (8) "Manager" or "operator" means the person responsible for the daily operation of an adult care facility. the manager and the owner of a facility may be the same person.
- (9) "Minor drug possession offense" has the same meaning as in section 2925.01 of the Revised Code.
- (10) "Multiple disqualifying offenses" means two or more convictions or guilty pleas to disqualifying offenses. Convictions or guilty pleas resulting from or connected with the same act, or resulting from offenses committed at the

same time, shall be counted as one conviction or guilty plea.

- (11) "Owner" means the person who owns the business of and who ultimately controls the operation of an adult care facility and to whom the manager or operator, if different from the owner, is responsible.
- (12) "Residential facility" has the same meaning as found in section 5119.34 of the Revised Code.

(C) Requirements for owners, operators, managers, and prospective operators.

- (1) All requirements of this rule applicable to applicants shall also be applicable to owners, operators, and managers.
- (2) An owner, operator, manager or prospective operator shall:
 - (a) Require an applicant to complete an employment application and provide the names and addresses of present and former employers; and
 - (b) Attempt to obtain references from the applicant's present and former employers and maintain written evidence that reference checks were attempted and/or completed.
- (3) An owner, operator, manager, or prospective operator shall check each of the following databases to determine if the applicant is included:
 - (a) The list of excluded persons 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, and section 1156 of the Social Security Act, 96 Stat. 388 (1982), 42 U.S.C. 1320c-5;
 - (b) The abuser registry established pursuant to section 5123.52 of the Revised Code;
 - (c) The nurse aide registry established pursuant to section 3721.32 of the Revised Code, and if there is a statement detailing finding by the director of the Ohio department of health that the applicant or employee neglected or abused a resident of a long-term care facility or residential care facility or misappropriated property of such a resident;

- (d) The sex offender and child-victim offender database established pursuant to division (A)(11) of section 2950.13 of the Revised Code;
- (e) The United States general services administration system for award management database; and,
- (f) The database of incarcerated and supervised offenders established pursuant to section 5120.066 of the Revised Code.

The owner, operator, manager or prospective operator shall maintain written evidence of the results of these database checks.

- (4) A residential facility shall not employ an application or continue to employ an employee if the applicant or employee is included in one or more of the databases described in paragraphs (C)(3)(a) to (C)(3)(f) of this rule.
- (5) A residential facility shall verify that an applicant has a valid motor vehicle operator's license and obtain a driving record prepared by the bureau of motor vehicles if the duties of the position for which the applicant has applied require the applicant to transport individuals or to operate the responsible entity's vehicles for any other purpose. A person having six or more points on his or her driving record is prohibited from transporting individuals.
- (6) Prior to employing an applicant, a residential facility shall require an applicant to:
 - (a) Submit a statement to the residential facility with the applicant's signature attesting that he or she has not been convicted of or pleaded guilty to a disqualifying offense. An applicant or employee shall disclose to the residential facility a conviction for any offense that has been sealed; and,
 - (b) Sign an agreement under which the applicant agrees to notify the residential facility within fourteen calendar days if, while employed by the residential facility, the applicant is formally charged with, is convicted of, or pleads guilty to a disqualifying offense. The agreement shall provide that failure to make the notification may result in termination of the applicant's employment.
- (7) A residential facility shall request the bureau of criminal identification and investigation to conduct a criminal records check of an applicant.

- (a) If an applicant does not present proof that he or she has been a resident of Ohio for the five-year period immediately prior to the date upon which the criminal records check is requested, the residential facility shall request that the bureau of criminal identification and investigation obtain information from the federal bureau of investigation as part of the criminal records check.
- (b) If an applicant presents proof that he or she has been a resident of Ohio for the five-year period immediately prior to the date upon which the criminal records check is requested, the residential facility may request that the bureau of criminal identification and investigation obtain information from the federal bureau of investigation as part of the criminal records check.

For purposes of this paragraph, an applicant may provide proof of Ohio residency by presenting, with a notarized statement asserting that he or she has been a resident of Ohio for that five-year period, a valid driver's license, notification of registration as an elector, a copy of an officially filed federal or state tax form identifying the applicant's permanent residence, or any other document the residential facility considers acceptable.

- (8) A residential facility may conditionally employ an applicant, for a period not to exceed sixty days, pending receipt of information concerning the applicant's criminal records check once the applicant submits to the responsible entity the statement required by paragraph (C)(5)(a) of this rule. The residential facility shall terminate the applicant's employment if it is informed that the applicant has been convicted of or pleaded guilty to a disqualifying offense.
- (9) A residential facility shall, at a frequency of no less than once every five years, check the databases specified in paragraph (C)(2) of this rule and request the bureau of criminal identification and investigation to conduct a criminal records check for each employee in a direct services position.
 - (a) If an employee in a direct services position does not present proof that he or she has been a resident of Ohio for the five-year period immediately prior to the date upon which the criminal records check is requested, the residential facility shall request that the bureau of criminal identification and investigation obtain information from the federal bureau of investigation as part of the criminal records check.
 - (b) If an employee in a direct services position presents proof that he or she has been a resident of Ohio for the five-year period immediately prior to the date upon which the criminal records check is requested, the

residential facility may request that the bureau of criminal identification and investigation obtain information from the federal bureau of investigation as part of the criminal records check.

For purposes of this paragraph, an employee in a direct services position may provide proof of Ohio residency by presenting, with a notarized statement asserting that he or she has been a resident of Ohio for that five-year period, a valid driver's license, notification of registration as an elector, a copy of an officially filed federal or state tax form identifying the employee's permanent residence, or any other document the residential facility considers acceptable.

- (10) A residential facility that has not been required, prior to the effective date of this rule, to request post-hire criminal records checks of its employees shall check the databases specified in paragraph (C)(2) of this rule and ensure a criminal records check for each employee in a direct services position is conducted in accordance with paragraph (C)(9) of this rule by December 31, 2014. Thereafter, the residential facility shall comply with paragraph (C)(9) of this rule.

(D) Disqualifying offenses.

- (1) There are five tiers of disqualifying offenses with corresponding time periods that preclude an applicant from being employed or an employee from remaining employed by a residential facility.

(a) Tier one: permanent exclusion.

No residential facility shall employ an applicant or continue to employ an employee if the applicant or employee has been convicted of or pleaded guilty to any of the following sections of the Revised Code:

- (i) 2903.01 (aggravated murder);
- (ii) 2903.02 (murder);
- (iii) 2903.03 (voluntary manslaughter);
- (iv) 2903.11 (felonious assault);
- (v) 2903.15 (permitting child abuse);
- (vi) 2903.16 (failing to provide for a functionally impaired person);

- (vii) 2903.34 (patient abuse and neglect);
- (viii) 2903.341 (patient endangerment);
- (ix) 2905.01 (kidnapping);
- (x) 2905.02 (abduction);
- (xi) 2905.32 (human trafficking);
- (xii) 2905.33 (unlawful conduct with respect to documents);
- (xiii) 2907.02 (rape);
- (xiv) 2907.03 (sexual battery);
- (xv) 2907.04 (unlawful sexual conduct with a minor, formerly
corruption of a minor);
- (xvi) 2907.05 (gross sexual imposition);
- (xvii) 2907.06 (sexual imposition);
- (xviii) 2907.07 (importuning);
- (xix) 2907.08 (voyeurism);
- (xx) 2907.12 (felonious sexual penetration);
- (xxi) 2907.31 (disseminating matter harmful to juveniles);
- (xxii) 2907.32 (pandering obscenity);
- (xxiii) 2907.321 (pandering obscenity involving a minor);
- (xxiv) 2907.322 (pandering sexually-oriented matter involving a
minor);

- (xxv) 2907.323 (illegal use of minor in nudity-oriented material or performance);
 - (xxvi) 2909.22 (soliciting/providing support for act of terrorism);
 - (xxvii) 2909.23 (making terrorist threat);
 - (xxviii) 2909.24 (terrorism);
 - (xxix) 2913.40 (medicaid fraud);
 - (xxx) 2923.01 (conspiracy), 2923.02 (attempt), or 2923.03 (complicity) when the underlying offense is any of the offenses or violations described in paragraphs (D)(1)(a)(i) to (D)(1)(a)(xxix) of this rule;
 - (xxxi) A conviction related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct involving a federal or state-funded program, excluding the disqualifying offenses set forth in section 2913.46 of the Revised Code (illegal use of supplemental nutrition assistance program or women, infants, and children program benefits); or
 - (xxxii) A violation of an existing or former municipal ordinance or law of this state, any other state, or the United States that is substantially equivalent to any of the offenses or violations described in paragraphs (D)(1)(a)(i) to (D)(1)(a)(xxxi) of this rule.
- (b) No residential facility shall employ an applicant or continue to employ an employee, if the applicant or employee has been convicted of an offense, where the victim of the offense was one of the following:
- (i) A person under eighteen years of age.
 - (ii) A functionally impaired person as defined in section 2903.10 of the Revised Code.
 - (iii) A mentally retarded person as defined in section 5123.01 of the Revised Code.

(iv) A developmentally disabled person as defined in section 5123.01 of the Revised Code.

(v) A person with a mental illness as defined in section 5122.01 of the Revised Code.

(vi) A person sixty years of age or older.

(c) Tier two: ten-year exclusion.

No residential facility shall employ an applicant or continue to employ an employee, for a period of ten years from the date the applicant or employee was fully discharged from imprisonment, probation, and parole, if the applicant or employee has been convicted of or pleaded guilty to any of the following sections of the Revised Code:

(i) 2903.04 (involuntary manslaughter);

(ii) 2903.041 (reckless homicide);

(iii) 2905.04 (child stealing) as it existed prior to July 1, 1996;

(iv) 2905.05 (criminal child enticement);

(v) 2905.11 (extortion);

(vi) 2907.21 (compelling prostitution);

(vii) 2907.22 (promoting prostitution);

(viii) 2907.23 (enticement or solicitation to patronize a prostitute, procurement of a prostitute for another;

(ix) 2909.02 (aggravated arson);

(x) 2909.03 (arson);

(xi) 2911.01 (aggravated robbery);

- (xii) 2911.11 (aggravated burglary);
- (xiii) 2913.46 (illegal use of supplemental nutrition assistance program or women, infants, and children program benefits);
- (xiv) 2913.48 (worker's compensation fraud);
- (xv) 2913.49 (identity fraud);
- (xvi) 2917.02 (aggravated riot);
- (xvii) 2923.12 (carrying concealed weapon);
- (xviii) 2923.122 (illegal conveyance or possession of deadly weapon or dangerous ordnance in a school safety zone, illegal possession of an object indistinguishable from a firearm in a school safety zone);
- (xix) 2923.123 (illegal conveyance, possession, or control of deadly weapon or dangerous ordnance into courthouse);
- (xx) 2923.13 (having weapons while under disability);
- (xxi) 2923.161 (improperly discharging a firearm at or into a habitation or school);
- (xxii) 2923.162 (discharge of firearm on or near prohibited premises);
- (xxiii) 2923.21 (improperly furnishing firearms to minor);
- (xxiv) 2923.32 (engaging in pattern of corrupt activity);
- (xxv) 2923.42 (participating in criminal gang);
- (xxvi) 2925.02 (corrupting another with drugs);
- (xxvii) 2925.03 (trafficking in drugs);
- (xxviii) 2925.04 (illegal manufacture of drugs or cultivation of

marihuana);

(xxix) 2925.041 (illegal assembly or possession of chemicals for the manufacture of drugs);

(xxx) 3716.11 (placing harmful objects in food or confection);

(xxxi) 2923.01 (conspiracy), 2923.02 (attempt), or 2923.03 (complicity) when the underlying offense is any of the offenses or violations described in paragraphs (D)(1)(c)(i) to (D)(1)(c)(xxx) of this rule; or

(xxxii) A violation of an existing or former municipal ordinance or law of this state, any other state, or the United States that is substantially equivalent to any of the offenses or violations described in paragraphs (D)(1)(c)(i) to (D)(1)(c)(xxxi) of this rule.

(d) Tier three: seven-year exclusion.

No residential facility shall employ an applicant or continue to employ an employee, for a period of seven years from the date the applicant, or employee was fully discharged from imprisonment, probation, and parole, if the applicant or employee has been convicted of or pleaded guilty to any of the following sections of the Revised Code:

(i) 959.13 (cruelty to animals);

(ii) 959.131 (prohibitions concerning companion animals);

(iii) 2903.12 (aggravated assault);

(iv) 2903.21 (aggravated menacing);

(v) 2903.211 (menacing by stalking);

(vi) 2905.12 (coercion);

(vii) 2909.04 (disrupting public services);

(viii) 2911.02 (robbery);

- (ix) 2911.12 (burglary);
- (x) 2913.47 (insurance fraud);
- (xi) 2917.01 (inciting to violence);
- (xii) 2917.03 (riot);
- (xiii) 2917.31 (inducing panic);
- (xiv) 2919.22 (endangering children);
- (xv) 2919.25 (domestic violence);
- (xvi) 2921.03 (intimidation);
- (xvii) 2921.11 (perjury);
- (xviii) 2921.13 (falsification, falsification in theft offense, falsification to purchase firearm, or falsification to obtain a concealed handgun license);
- (xix) 2921.34 (escape);
- (xx) 2921.35 (aiding escape or resistance to lawful authority);
- (xxi) 2921.36 (illegal conveyance of weapons, drugs, or other prohibited items onto grounds of detention facility or institution);
- (xxii) 2925.05 (funding of drug or marihuana trafficking);
- (xxiii) 2925.06 (illegal administration or distribution of anabolic steroids);
- (xxiv) 2925.24 (tampering with drugs);
- (xxv) 2927.12 (ethnic intimidation);

(xxvi) 2923.01 (conspiracy), 2923.02 (attempt), or 2923.03 (complicity) when the underlying offense is any of the offenses or violations described in paragraphs (D)(1)(d)(i) to (D)(1)(d)(xxv) of this rule; or

(xxvii) A violation of an existing or former municipal ordinance or law of this state, any other state, or the United States that is substantially equivalent to any of the offenses or violations described in paragraphs (D)(1)(d)(i) to (D)(1)(d)(xxvi) of this rule.

(e) Tier four: five-year exclusion.

No residential facility shall employ an applicant or continue to employ an employee, for a period of five years from the date the applicant or employee was fully discharged from imprisonment, probation, and parole, if the applicant or employee has been convicted or pleaded guilty to any of the following sections of the Revised Code:

(i) 2903.13 (assault);

(ii) 2903.22 (menacing);

(iii) 2907.09 (public indecency);

(iv) 2907.24 (soliciting after positive human immunodeficiency virus test);

(v) 2907.25 (prostitution);

(vi) 2907.33 (deception to obtain matter harmful to juveniles);

(vii) 2911.13 (breaking and entering);

(viii) 2913.02 (theft);

(ix) 2913.03 (unauthorized use of a vehicle);

(x) 2913.04 (unauthorized use of property, computer, cable, or telecommunication property);

- (xi) 2913.05 (telecommunications fraud);
- (xii) 2913.11 (passing bad checks);
- (xiii) 2913.21 (misuse of credit cards);
- (xiv) 2913.31 (forgery, forging identification cards);
- (xv) 2913.32 (criminal simulation);
- (xvi) 2913.41 (defrauding a rental agency or hostelry);
- (xvii) 2913.42 (tampering with records);
- (xviii) 2913.43 (securing writings by deception);
- (xix) 2913.44 (personating an officer);
- (xx) 2913.441 (unlawful display of law enforcement emblem);
- (xxi) 2913.45 (defrauding creditors);
- (xxii) 2913.51 (receiving stolen property);
- (xxiii) 2919.12 (unlawful abortion);
- (xxiv) 2919.121 (unlawful abortion upon minor);
- (xxv) 2919.123 (unlawful distribution of an abortion-inducing drug);
- (xxvi) 2919.23 (interference with custody);
- (xxvii) 2919.24 (contributing to unruliness or delinquency of child);
- (xxviii) 2921.12 (tampering with evidence);
- (xxix) 2921.21 (compounding a crime);

- (xxx) 2921.24 (disclosure of confidential information);
- (xxxi) 2921.32 (obstructing justice);
- (xxxii) 2921.321 (assaulting/harassing police dog or horse/service animal);
- (xxxiii) 2921.51 (impersonation of peace officer);
- (xxxiv) 2925.09 (illegal administration, dispensing, distribution, manufacture, possession, selling, or using any dangerous veterinary drug);
- (xxxv) 2925.11 (drug possession other than a minor drug possession offense);
- (xxxvi) 2925.13 (permitting drug abuse);
- (xxxvii) 2925.22 (deception to obtain dangerous drugs);
- (xxxviii) 2925.23 (illegal processing of drug documents);
- (xxxix) 2925.36 (illegal processing of drug samples);
- (xl) 2925.55 (unlawful purchase of pseudoephedrine product);
- (xli) 2925.56 (unlawful sale of pseudoephedrine product);
- (xlii) 2923.01 (conspiracy), 2923.02 (attempt), or 2923.03 (complicity) when the underlying offense is any of the offenses or violations described in paragraphs (D)(1)(e)(i) to (D)(1)(e)(xli) of this rule;
or
- (xliii) A violation of an existing or former municipal ordinance or law of this state, any other state, or the United States that is substantially equivalent to any of the offenses or violations described in paragraphs (D)(1)(e)(i) to (D)(1)(e)(xlii) of this rule.

(f) Tier five: no exclusion.

A residential facility may employ an applicant or continue to employ an employee, if the applicant or employee has been convicted of or pleaded guilty to any of the following sections of the Revised code:

- (i) 2925.11 (drug possession that is minor drug possession offense);
- (ii) 2925.14 (illegal use or possession of drug paraphernalia);
- (iii) 2925.141 (illegal use or possession of marihuana drug paraphernalia); or
- (iv) A violation of an existing or former municipal ordinance or law of this state, any other state, or the United States that is substantially equivalent to any of the offenses or violations described in paragraphs (D)(1)(f)(i) to (D)(1)(f)(iii) of this rule.

(2) Multiple disqualifying offenses.

- (a) If an applicant or employee has been convicted of or pleaded guilty to multiple disqualifying offenses listed in paragraph (D)(1)(c) of this rule, and offenses listed in paragraph (D)(1)(d) of this rule, and paragraph (D)(1)(e) of this rule, the applicant or employee is subject to a fifteen-year exclusion period.
 - (b) If an applicant or employee has been convicted of or pleaded guilty to multiple disqualifying offenses listed in paragraph (D)(1)(d) of this rule and offenses listed in paragraph (D)(1)(e) of this rule, the applicant or employee is subject to a ten-year exclusion period.
 - (c) If an applicant or employee has been convicted of or pleaded guilty to multiple disqualifying offenses listed in paragraph (D)(1)(e) of this rule, the applicant or employee is subject to a seven-year exclusion period.
- (E) A conviction of or plea of guilty to a disqualifying offense listed or described in paragraph (D)(1) of this rule shall not preclude an applicant from being employed or an employee from remaining employed by a responsible entity under the following circumstances:
- (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 this state, any other state, or the United States, if the law is substantially equivalent to Chapter 2967. of the Revised Code;
 - (3) The applicant's or employee's conviction or guilty plea has been overturned pursuant to law;
 - (4) The applicant or employee has been granted a conditional pardon for the offense pursuant to Chapter 2967. of the Revised Code and the conditions under which the pardon was granted have been satisfied;
 - (5) The applicant's or employee's conviction or guilty plea is not for an offense listed or described in paragraph (D)(1)(a) of this rule and the applicant or employee has 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; or
 - (6) The applicant's or employee's conviction or guilty plea is not for an offense listed or described in paragraph (D)(1)(a) of this rule and the applicant or employee has a certificate of achievement and employability in a home and community-based services-related field, issued by the Ohio department of rehabilitation and correction pursuant to section 2961.22 of the Revised Code.
- (F) A residential facility may continue to employ a person who is excluded by paragraph (D)(1)(d) of this rule if the conviction for a tier four offense occurred prior to the effective date of this rule, the employee was hired prior to the effective date of this rule, and if the residential facility has considered the nature and seriousness of the offense and attests in writing to the character and fitness of the person based on the person's demonstrated work performance. The residential facility shall make this determination within three months after the effective date of this rule and shall maintain the written attestation in the employee's personnel record. The determination shall be subject to review by the department.
- (G) Any report obtained pursuant to this rule is not a public record for purposes of section 149.43 of the Revised Code and shall not be made available to any person other than:
- (1) The applicant or employee who is the subject of the report or the applicant's, or employee's representative;
 - (2) The residential facility that requested the report or its representative;

- (3) The department, if the department requests the residential facility to provide a copy of the report to the department;
 - (4) A court, hearing officer, or other necessary person involved in a case dealing with the denial of employment to the applicant or employee, or a civil or criminal action regarding the medicaid program or a program the department administers.
- (H) For purposes of this rule, reports from the bureau of criminal identification and investigation, or any other state or federal agency regarding a person's criminal record, and records supplied by the bureau of motor vehicles regarding a person's record of convictions for violations of motor vehicle laws are valid for a period of one year from the date of the report.
- (I) A residential facility shall ensure the safety of residents in any situation in which a non-employee is living in the facility.

Effective: 01/01/2018

Five Year Review (FYR) Dates: 01/20/2017

CERTIFIED ELECTRONICALLY

Certification

04/05/2017

Date

Promulgated Under:	119.03
Statutory Authority:	5119.34
Rule Amplifies:	5119.34
Prior Effective Dates:	3/20/2014