

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Health

Regulation/Package Title: OAC 3701-61, Resident Transfer and Discharge

Rule Number(s): 3701-61-01, 3701-61-02, 3701-61-04, 3701-61-05, 3701-61-06, 3701-61-07,
3701-61-08

Date: February 28, 2012

Rule Type:

☒ New

☒ Amended

☒ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

These rules set forth the procedures for facility-initiated transfer or discharge of a resident from a nursing home or residential care facility. This includes the provision of

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notice of a proposed transfer/discharge, as well as the resident's right to challenge the proposed transfer/discharge, including the request for a hearing before a hearing officer. These rules also set forth the "bed hold" policies for Medicaid residents who are transferred to a hospital or for therapeutic leave. This bed hold policy gives a resident notice of the number of days that the resident has to resume residency at the facility. These rules also set forth the requirement that direct care employees of a home or adult daycare receive criminal background checks prior to employment.

ODH is proposing the following amendments:

- 3701-61-01 – sets forth definitions for the terms "distinct part," "dually certified part," "resident transfer," and "room change;"
- 3701-61-02 – corrects citation to rule 3701-61-03; and
- 3701-61-04 – corrects citations to rule 3701-61-03.

ODH is also proposing draft new rule 3701-61-08 to clarify notice requirements when a facility proposes a room change.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

ORC 3721.11

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

No. However, 42 CFR 483.12 contains similar requirements for Medicare and Medicaid certified nursing facilities. The ODH regulations are applicable to facilities beyond those covered by 42 CFR 483.12.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

N/A

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

The Department of Health is required (ORC 3721.11) to set forth rules governing procedures to implement the transfer and discharge requirements set forth in ORC sections 3721.16, 3721.161, and 3721.162. This law and the rules adopted thereunder

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describe what conditions may lead to a facility initiated transfer or discharge. The rules set forth a process to ensure the resident and their sponsor that the transfer or discharge is not arbitrary and that any transfer or discharge is safe and orderly. Additionally, to ensure fairness, the facility is required to provide sufficient notice to the resident and their sponsor of the proposed discharge and of the resident's rights in relation to the proposed transfer/discharge, including the right to a hearing the telephone number of the state long term care ombudsman. Finally, the rules allow for a facility that admits residents to a portion of the facility with specialized rooms or equipment to provide notice upon admission to that unit of the facility's policy on room changes when the resident no longer require the specialized room or equipment.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

Successful outcomes would be evidenced by compliance measured through a standard survey process approximately every fifteen months. Further evidence of success would be represented by the number of complaints regarding transfer and discharge of residents received and the number of validated complaint surveys.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

In this particular instance, the Governor's Office of Health Transformation handled stakeholder input. Meetings were held from early 2011 until late summer and included representatives from:

- Ohio Health Care Association
- The Academy of Senior Health Sciences
- LeadingAge

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

The amendments to rule 3701-61-01 and new rule 3701-61-08 are the result of collaboration between the Governor's Office of Health Transformation, ODH, and stakeholders.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

N/A

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

The Ohio Department of Health is required to monitor compliance with the transfer and discharge standards mandated by section 3701.16, 3701.16.1, and 3701.16.2 of the Revised Code. Alternative regulations to the rules set forth in Chapter 3701-61 of the Administrative Code were not considered. The rules reflect the current industry standards pertaining to resident transfer and discharge. Many facilities covered by these rules are expected to meet these standards for participation in Centers for Medicare and Medicaid Services programs.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

ODH rules contain both structural (process) and performance (outcome) based requirements. When there is a bad outcome, ODH can then look to ensure that the requirements of the rule were implemented properly and can identify break-downs in the process through surveys to provide opportunities for the services to correct their identified deficiencies and meet the quality and safety standards required by statute.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

As part of the 5 year review, ODH reviews the rules of other agencies to determine if there is duplication.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

Providers will be surveyed at least once every 15 months to determine compliance with this regulation. The survey will be done by health care facility program staff using a standard survey tool. This staff will have been trained in the survey process, including understanding of the regulation(s).

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

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- a. **Identify the scope of the impacted business community;**
- b. **Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**

- c. **Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

a. There are approximately 1,500 nursing homes and residential care facilities that are impacted by this rule.

b. A home that violates the transfer and discharge requirement could be subject to an ORC Chapter 119 hearing where a fine could be assessed. There are additional penalties associated with federally-certified facilities, but such penalties are set by the Centers for Medicare and Medicaid Services, not ODH. Additionally, ODH may refer cases to the Attorney General if there is evidence of substantially less than adequate care at a home or substantially unsafe conditions in a home.

c. The highest cost of compliance is associated with preparing and providing notice to residents and resident sponsors. Compliance with this provision may require less than one hour of work by administrative personnel. Costs for implementation are between an average of \$15.37 to an average of \$32.16 per hour*.

A facility that attends a hearing or appeal resulting from a proposed transfer or discharge may elect to employ an attorney at a cost of \$53.27 per hour* for approximately five hours of work.

*United States Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages for the State of Ohio, May, 2010, codes for Office and Administrative Support Occupations (43-0000), Healthcare Practitioner and Technical Occupations (29-0000) and Lawyers (23-1011). ODH is aware that attorneys in this field likely charge more than the average across all attorneys in Ohio, however, accurate information for attorneys specializing in this practice is difficult to deduce with any specificity.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

Taken as a whole, these rules protect elderly and infirm Ohioans from arbitrary transfer and being transferred or discharged from what is now their home. The rules do allow for a home to transfer or discharge a resident without notice for any of nine reasons, including but not limited to, the home cannot meet the needs of the resident, the resident is not paying for the care provided, or if the resident is endangering the safety of others in the home.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

N/A

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

This information may be found on the ODH Regulatory Ombudsman's website:

<http://www.odh.ohio.gov/rules/ombudsman/regulatoryombudsman.aspx>.

18. What resources are available to assist small businesses with compliance of the regulation?

ODH personnel are available by phone or email to assist anyone with questions. Additional guidance is posted to the following ODH webpages:

<http://www.odh.ohio.gov/odhPrograms/ltc/nurhome/nurhome1.aspx>;

<http://www.odh.ohio.gov/odhPrograms/ltc/rcfacal/rcfacal1.aspx>.