

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Job and Family Services

Regulation/Package Title: 5101:3-45 Criminal Record Check Rules

Rule Number(s): OAC 5101:3-45-07, 5101:3-45-08 and 5101:3-45-11

Date: _____

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☒ Rescinded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.

Rules 5101:3-45-07, 5101:3-45-08 and 5101:3-45-11 of the Ohio Administrative Code (OAC) implement the criminal records check requirements set forth in sections 109.572, 5111.033 and

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5111.034 of the Ohio Revised Code. The rules require each applicant for, and every employee in, a full-time, part-time or temporary position that involves providing home and community-based services (HCBS) to individuals enrolled on the Ohio Home Care, Transitions DD and Transitions Carve-Out Waiver Programs to undergo a criminal records check from the Bureau of Criminal Investigation and Identification (BCII). An additional Federal Bureau of Investigation (FBI) criminal records check is required if the applicant or employee cannot prove continued residency in Ohio for the previous five years. Additionally, the rules set forth a recheck requirement of every five years for agency employees, and annually for independent providers. The rules provide the list of disqualifying offenses that may prohibit an individual from working in a position that involves providing HCBS. Further, the rules authorize the conditional employment by an agency of an individual for up to sixty days while awaiting the results of the criminal records check. Finally, the rules establish the exclusionary period for which individuals convicted of certain crimes may not be hired.

The specific actions taken for each rule and each rule's content is set forth below.

OAC 5101:3-45-07

This new rule replaces current OAC rule 5101:3-45-07 and sets forth the criminal records check requirements for agency providers of HCBS under the Ohio Home Care, Transitions DD and Transitions Carve-Out Waiver Programs. The rule:

- Establishes key definitions including, but not limited to: “applicant,” “chief administrator,” “community-based long term care agency,” “disqualifying offense,” “employee,” “home and community-based services Medicaid waiver component” and “waiver agency.”
- Establishes a required review of various free databases for disqualifying information regarding an applicant or employee prior to conducting a criminal records check of an applicant or employee.
- Exempts from database reviews and criminal records checks those individuals who are already subject to criminal records check requirements in accordance with section 3701.881 or section 173.394 of the Revised Code.
- Phases in a required five-year criminal records recheck. Employees hired prior to January 1, 2008 will be rechecked within thirty days of the anniversary of their date of hire, and employees hired on or after January 1, 2008 will be rechecked within thirty days of the five-year anniversary of their date of hire.
- Requires a fee to be paid to BCII by the waiver agency, which may be passed on to the applicant or employee.

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- Provides for a 60-day period of conditional employment while the waiver agency awaits the results of the criminal records check. The rule requires the waiver agency to terminate an individual if the results are not received within 60 days of the request or if the results disclose a disqualifying offense and the waiver agency does not choose to employ the individual after the exclusionary periods set forth in OAC rule 5101:3-45-11 have elapsed.
- Establishes recordkeeping requirements pertaining to the criminal records check.
- Sets forth to whom the results of the records check may be disclosed.

OAC 5101:3-45-08

This new rule replaces, in part, rescinded rule 5101:3-45-08 and sets forth the criminal records check requirements for independent providers of Home and Community Based-Services (HCBS) under the Ohio Home Care, Transitions DD and Transitions Carve-Out Waiver Programs. The rule:

- Establishes key definitions including but not limited to: “anniversary date,” “applicant,” “disqualifying offense,” “effective date of provider agreement,” “home and community-based services Medicaid waiver component” and “independent provider.”
- Requires annual criminal records rechecks for all independent providers.
- Requires a fee to be paid to BCII by the independent provider.
- Establishes recordkeeping requirements pertaining to the criminal records check.
- Sets forth to whom the results of the records check may be disclosed.

OAC 5101:3-45-11

OAC 5101:3-45-11 is a new rule that sets forth the exclusionary periods for disqualifying offenses. This rule also sets forth the effect of certificates of qualification for employment, certificates of achievement and employability, and pardons. The new exclusionary periods are as follows:

- Permanent Bar – Cannot be hired in a direct care position;
- Ten Year Bar – Can be hired after ten years have elapsed from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole. For individuals with multiple disqualifying offenses, of which at least one falls under the ten year bar, the individual

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can be hired after fifteen years have elapsed from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole.

- Seven Year Bar - Can be hired after seven years have elapsed from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole. For individuals with multiple disqualifying offenses, of which at least one falls under the seven year bar, the individual can be hired after ten years have elapsed from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole.

- Five Year Bar - Can be hired after five years have elapsed from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole. For individuals with multiple disqualifying offenses, of which at least one falls under the five year bar, the individual can be hired after seven years have elapsed from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole.

- No Bar - Can be hired at any time.

Unless the individual was convicted of a disqualifying offense that falls under the permanent bar, a waiver agency may hire or continue to employ; and an Ohio Home Care, Transitions DD or Transitions Carve-Out Waiver consumer can choose to receive services from, individuals with either a certificate of qualification for employment issued by a court of common pleas with competent jurisdiction or a certificate of achievement and employability in an HCBS-related field, issued by the department of rehabilitation.

Finally, a waiver agency may hire, and an Ohio Home Care, Transitions DD or Transitions Carve-Out Waiver consumer can choose to receive services from, an individual at any time if that individual has received a pardon or had a conviction or guilty plea set aside.

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

Ohio Revised Code sections 5111.033, 5111.034 and 5111.85.

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.

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

Not applicable.

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)?

These rules implement the statutory requirements set forth in sections 109.572, 5111.033 and 5111.034 of the Revised Code. They provide the necessary framework for the Ohio Department of Job and Family Services to enforce with the aforementioned statutory requirements, as well as assure the health and welfare of individuals participating in the Ohio Home Care, Transitions DD and Transitions Carve-Out Waivers in accordance with 42 CFR 441.302 (a). Specifically, 42 CFR 441.302(a) states:

(a) Health and Welfare—Assurance that necessary safeguards have been taken to protect the health and welfare of the recipients of the services. Those safeguards must include—

(1) Adequate standards for all types of providers that provide services under the waiver;

(2) Assurance that the standards of any State licensure or certification requirements are met for services or for individuals furnishing services that are provided under the waiver; and

(3) Assurance that all facilities covered by section 1616(e) of the Act, in which home and community-based services will be provided, are in compliance with applicable State standards that meet the requirements of 45 CFR Part 1397 for board and care facilities.

One way ODJFS helps to ensure the health and welfare of recipients of waiver services is by requiring that those individuals providing such care submit to a criminal records check.

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

Successful outcomes are measured through a finding of compliance with these standards. Additionally, the expectation is a reduction in the number of allegations of criminal activity on the part of HCBS waiver service providers.

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.

Stakeholder outreach was facilitated by the Governor's Office of Health Transformation and not through ODJFS. See Attachment III for details.

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

Stakeholders were generally supportive of OAC rules 5101:3-45-07, 5101:3-45-08 and 5101:3-45-11, although it was acknowledged that the more frequent criminal records checks have a financial cost to providers. Most notably, providers are supportive of the exclusionary periods set forth in rule 5101:3-45-11. The following specific concerns have been addressed:

- Five-year recheck, rather than the proposed three.
- Recheck is from the anniversary of date of hire.

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?

The following articles were used in developing the exclusionary period tiers set forth in OAC rule 5101:3-45-11:

- *Redemption in the Presence of Widespread Criminal Background Checks*, Criminology, 47: 327–359. 2009.
- *Scarlet Letters and Recidivism: Does an Old Crime Predict Future Offending?* Criminology and Public Policy 5:493-522. 2006.
- *Enduring Risk: Does an Old Crime Predict Future Offending?* Crime and Delinquency 53:64-83. 2007.
- *When Do Ex-Offenders Become Like Non-Offenders?* Howard Journal of Criminal Justice 48:373-87. 2009.
- *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time To Redemption?* Criminology 49:27-60. 2011.

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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 Job and Family Services is required to implement sections 109.572, 5111.033 and 5111.034 of the Revised Code. Alternative regulations to these three rules were not considered. The rules reflect the current statutory requirements and the industry-approved exclusionary periods.

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.*

A performance-based regulation was not deemed appropriate for this standard and was not authorized by statute.

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

The agency conducted a thorough review of the Ohio Revised Code and Ohio Administrative Code to ensure there are no other regulations in place pertaining to these specific criminal records check requirements. OAC Rules 5101:3-45-07, 5101:3-45-08 and 5101:3-45-11 are the only rules applicable to Ohio Home Care, Transitions DD and Transitions Carve-Out Waiver providers.

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.

At the time of provider compliance reviews and during investigations of alleged health and welfare violations, ODJFS shall examine the provider's records to assure that criminal records check requirements are being applied consistently and predictably as set forth in the regulations.

Adverse Impact to Business

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

- a. Identify the scope of the impacted business community;

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For the purposes of these rules,

- “Waiver agency” means a person or government entity that provides HCBS under an Ohio Home Care, Transitions DD or Transitions Carve-Out Waiver, other than a person or government entity that is certified under the Medicare program. It does not include independent providers. It is estimated 150-200 waiver agencies will be affected by these changes.
- “Independent Provider” means a person who has a Medicaid provider agreement to provide HCBS as an independent provider in the Ohio Home Care, Transitions DD or Transitions Carve-Out Waiver. Independent provider is interchangeable with the term “non-agency provider” in Chapters 5101:3-45, 5101:3-46, 5101:3-47 and 5101:3-50 of the Administrative Code. Approximately 12,000 independent providers will be affected by these rules.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

Fees for BCII and FBI records checks and additional administrative time necessary to conduct a database check and to request the criminal records check and compile a personnel record.

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.

- 1) Administrative time conducting the database check.
- 2) Fee for Bureau of Criminal Investigation and Identification criminal records check for all applicants considered for employment is \$22.00, which may vary from county to county.
- 3) Fee for criminal records check from Federal Bureau of Investigation for each applicant considered for employment, who has not resided in Ohio for five years is \$24.00, which may vary from county to county. BCII accepts and processes FBI background checks.
- 4) Time spent requesting a criminal records check and compiling personnel records:

The administrative cost for conducting a database review is \$24 per hour based on industry estimates. ODJFS estimates that for waiver agencies the database review would take approximately 20 minutes per applicant/employee at a cost of \$8 administrative time per database review.

The cost to an average waiver agency, using an average cost of \$100.00 across employee types (registered nurses, licensed practical nurses, home health aides, and therapists):

- **\$1,806** for employees hired before January 1, 2008; and
- **\$361** each year going forward for employees hired in subsequent years.

Based upon these assumptions, ODJFS estimates a cost of \$361,193 to waiver agencies for first year and \$72,238 in subsequent years. Additionally, each agency will be required to either pay or pass on the cost for criminal records checks of new applicants that pass the database check, which average \$100 across employee types. See Attachments for specific information.

- 5) Independent providers will be responsible for the costs associated with their own background checks. This is consistent with current statute and practice.

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

The criminal records check is a valuable tool for waiver agencies to use when making prudent employment decisions, and for waiver consumers when selecting service providers. It helps to ensure the safety and protection of consumers receiving home health services.

Regulatory Flexibility

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

No, the criminal records check requirements are established by statute and may not be waived for any individual employed to provide HCBS in the Ohio Home Care, Transitions DD and Transitions Carve-Out Waivers.

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?

The waiver of penalties and fines for first-time paperwork offenses set forth in section 119.14 of the Ohio Revised Code will not be applied to the substantive statutory requirement for criminal records checks established in sections 5111.033 and 5111.034 of the Ohio Revised Code.

The requirement for a criminal records check by a waiver agency does not involve the direct collection of information or paperwork by the ODJFS or another regulatory body; the waiver agency is required to obtain and maintain a criminal records check for each applicant considered for employment involving providing direct care and each employee that provides direct care to an individual.

Failure to conduct a criminal records check on applicants for employment represents a significant potential for serious harm to health and welfare of waiver consumers and the public interest. As authorized by the applicable state laws and rules governing the specific waiver agency, ODJFS may take appropriate action against an HCBS provider that violates the requirements of these rules and section 5111.033 or 5111.034, as appropriate, of the Revised Code.

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

The agency maintains program staff that can assist and provide guidance or technical assistance to waiver agencies and independent providers to maintain compliance through the Bureau of Long Term Care Services and Supports:

BLTCSS@jfs.ohio.gov

Criminal records checks are obtained through BCII. Assistance may be received through the office of the Attorney General:

<http://www.ohioattorneygeneral.gov/Enforcement/BCI>