CSI - Ohio
The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Aging (ODA)

Regulation/Package Title: Choices Program

Rule Number(s): Rules 173-39-02.4 and 173-39-02.21 of the Administrative Code
Date: June 11, 2013 (Revised June 12, 2013)

Rule Type:
_ New
X Amended
X 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_ Rescinded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.

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Business Impact Analysis

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.

INTRODUCTION

Consumer Direction

"Population studies report that, from 2005 to 2020, the [national] population age 85 and older will increase by 43 percent. ... Eighty-four percent of those age 50 and older want to remain in their homes as they age. If they need help with everyday activities such as bathing, dressing and eating, they want to choose who provides that help and control when and how they receive assistance."[1] "When consumers direct their own services, they decide which agencies or individuals they will hire to provide those services (and have the authority to fire them if necessary) and when and how the services will be delivered."[2]

These Rules: Medicaid Waiver Programs Only

There is more than one route for doing business with ODA-administered programs.

- A consumer-directed provider may provide services to a consumer who is enrolled in the Choices or PASSPORT Programs. ODA began allowing consumer direction through the Choices program in 2001 and through the PASSPORT Program in 2011. A provider would only provide consumer-directed services through these two programs on the basis of being *certified* to provide the service.

- A consumer-directed[3] provider may provide services to a consumer who is receiving services through an Older Americans Act Program. Congress amended the Older Americans Act to allow for consumer-direction in 2006. A provider would only provide consumer-directed services through an Older Americans Act Program on the basis of entering into a *provider agreement.*

The amendments that ODA is proposing for rules 173-39-02.4 and 173-39-02.21 of the Administrative Code only pertain to providers who are *certified* to provide services to consumers enrolled in the Choices or PASSPORT Programs. The amendments do not pertain to consumer-directed providers under the Older Americans Act Programs.

2 Types of Consumer-Directed Providers in ODA's Medicaid Waiver Programs

The Choices and PASSPORT Programs each use consumer-directed providers. However, each program uses a different type of consumer-directed provider:

[1] American Association of Retired Persons and National Conference of State Legislatures. "Shifting the Balance: State Long-Term Care Reform Initiatives." Issue Brief No. 1 of 5. © February, 2009. *Pg.*, 1.
[2] American Association of Retired Persons and National Conference of State Legislatures. *Pg.*, 2.
[3] This is usually called "self-direction" instead of "consumer-direction," but the principle is the same.

- *Consumer-directed individual providers* provide home care attendant services to consumers who are enrolled in the Choices Program.

- *Consumer-directed personal care providers* provide personal care to consumers who are enrolled in the PASSPORT Program.

Consumers Already Considered Employers of Record
2/3 of states that NASUAD polled in 2012 indicated that consumers are the employers of record for consumer-directed providers.[4] Ohio's Choices and PASSPORT Programs are in alignment these states.

Weekly Hours Already Limited
Ohio law prohibits the PASSPORT Program's consumer-directed personal care providers from (1) working for more than 5 consumers per week, (2) working for more than 40 hours per week for 1 consumer, and (3) working for more than 56 hours per week for 2-5 consumers. On June 30, 2011, ODA adopted rule 173-39-02.21 of the Administrated Code, in part, "to keep consumers [who are enrolled in the PASSPORT Program and] who direct a consumer-directed personal care provider from paying overtime."[5]

Current Ohio law does not prohibit the Choices Program's consumer-directed individual providers from (1) working for more than 5 consumer-employers per week, (2) working for more than 40 hours per week for 1 consumer-employer, and (3) working for more than 56 hours per week for 2-5 consumer-employers. Yet, as ODA states under #14, virtually no consumer-directed individual providers are billing for more than 40 hours per week.

Occasion
Section 119.032 of the Revised Code requires ODA to review each rule no later than the rule's assigned review date. Accordingly, ODA has reviewed rules 173-39-02.4 and 173-39-02.21 of the Administrative Code before their review date and is now proposing to amend the rules.

AMENDMENT GOALS

Uniform Scheduling Regulations
ODA is proposing to amend rule 173-39-02.21 of the Administrative Code to adopt scheduling limitations for consumer-directed individual providers that serve consumers who are enrolled in the Choices program so the requirements are uniform with the scheduling limitations for consumer-directed providers that serve consumers who are enrolled in the PASSPORT Program. The scheduling limitations prohibit (1) working for more than 5 consumer-employers per week, (2) working for

[4] National Association of States United for Aging and Disabilities. "Consumer Directed Personal Care Services: Results of February 2012 Survey on Medicaid Funded Long Term Services and Supports." © March, 2012. *Pg.*, 2.
[5] Ohio Department of Aging. Rule Summary and Fiscal Analysis for rule 173-39-02.21 of the Administrative Code. As final filed on June 20, 2011. *Pg.*, 2.

more than 40 hours per week for 1 consumer-employer (except in emergencies), and (3) working for more than 56 hours per week for 2-5 consumer-employers.

Clarification

ODA proposes to amend the rules to explicitly state in rule 173-39-02.4 that the consumer is the employer of record. Currently, ODA has such a statement in paragraph (D)(2) of rule 173-39-02.11 of the Administrative Code for the consumer-directed personal care provider that serves consumers who are enrolled in the PASSPORT Program, but not in rule 173-39-02.4 of the Administrative Code for the consumer-directed individual provider that serve consumers who are enrolled in the Choices Program. However, in practice, both the PASSPORT and Choices Programs operate with the consumers as the employers of record. This is exemplified on ODA's website which states that the consumers are the employers of record for consumer-directed individual providers.[6] ODA's proposed amendment to rule 173-39-02.4 of the Administrative Code would make this matter explicit in the rule.

ODA is also proposing to amend rule 173-39-02.21 of the Administrative Code to indicate that a "provider may furnish a service that is not authorized by the consumer's service plan, but ODA (or ODA's designee) only reimburses the provider for furnishing a service that is authorized by the consumer's service plan." This is a standard in all Medicaid programs. ODA is taking this opportunity to make the matter explicit in this rule. In doing so, ODA is not creating any adverse impact.

Non-Substantive Improvements

ODA is proposing to amend rule 173-39-02.4 of the Administrative Code to reformat the rule so that it follows the order of more-recently revised rules. This includes (1) indicating that the requirements of the rule are in addition to the conditions of participation under rule 173-39-02 of the Administrative Code; (2) using subheadings in the rule (*e.g.*, "Oversight," "Provider qualifications," and "Rates and units"); (3) moving the units of service to the end of the rule; and (4) indicating that the maximum rates allowable for the service are established in the appendix to rule 5101:3-1-06.4 of the Administrative Code. These non-substantive amendments would create no adverse impact.

ODA is proposing to amend rule 173-39-02.21 of the Administrative Code so that the title of the rule and the two defined terms in the rule reflect that the rule applies to two types of consumer-directed providers: (1) consumer-directed individual providers and (2) consumer-directed personal care providers. In doing so, this would create no adverse impact.

[6] http://aging.ohio.gov/services/choices/ and http://aging.ohio.gov/resources/publications/profile_choices.pdf.

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

- Section 173.391 of the Revised Code requires ODA to adopt rules to establish requirements and to evaluate if the services provided by providers are done in a quality manner that is advantageous to the consumers of the services.

- Uncodified section 323.110 of pending H.B.59 (130th G.A.) would also authorize ODA to adopt rules for the Choices program, but sections 173.391, 173.01, and 173.02 of the Revised Code already give ODA the authority it needs to amend this rule.

- Section 173.40 of the Revised Code authorize ODA adopt rules for the PASSPORT Program.

- Sections 173.01 and 173.02 of the Revised Code give ODA general authority to adopt rules to regulate services provided through programs that it administers.

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.

ODA's proposed amendments are not the result of any federal requirement.

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

ODA's proposed amendments are not the result of any federal requirement.

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)?

One public purpose is to comply with statutory mandates. Section 173.391 of the Revised Code requires ODA to adopt rules to establish certification requirements and to evaluate the services provided by providers are done in a quality manner that is advantageous to the consumers of the services. Rules 173-39-02.4 and 173-39-02.21 of the Administrative Code are examples of such rules.

When ODA first proposed rule 173-39-02.21 of the Administrative Code in 2011, ODA stated the following purpose in the rule summary and fiscal analysis (RSFA):

> ODA proposing to adopt new rule 173-39-02.21 of the Administrative Code and to amend rule 173-39-05 of the Administrative Code. In doing so, ODA has 4 primary goals [2 of which were]:
>
> 1. To keep consumers who receive a personal care service safe (a) from an overworked consumer-directed personal care provider who may, without the proposed scheduling

limitations, seek employment from more than five consumer-employers per week, try to work for more than 40 hours per week for one consumer, or try to work for 2-5 consumer-employers for more than 56 hours per week; or (b) from an agency provider that may, without the proposed scheduling limitations, accept a referral to provide a consumer with a personal care service, but not have the staff capacity to furnish the total number of hours the consumer's case manager requests for the consumer.

2. To keep consumers who direct a consumer-directed personal care provider from paying overtime, because the proposed rule prohibits a consumer-directed provider from working for more than forty hours per week for any individual consumer who employs them.

Now, ODA is proposing to amend rule 173-39-02.21 of the Administrative Code so that the Choices Program would prohibit consumer-directed individual providers from (1) working for more than 5 consumer-employers per week, (2) working for more than 40 hours per week for 1 consumer-employer, and (3) working for more than 56 hours per week for 2-5 consumer-employers.

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

ODA (and ODA's designees) will monitor the providers for compliance.

Business Impact Analysis

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.

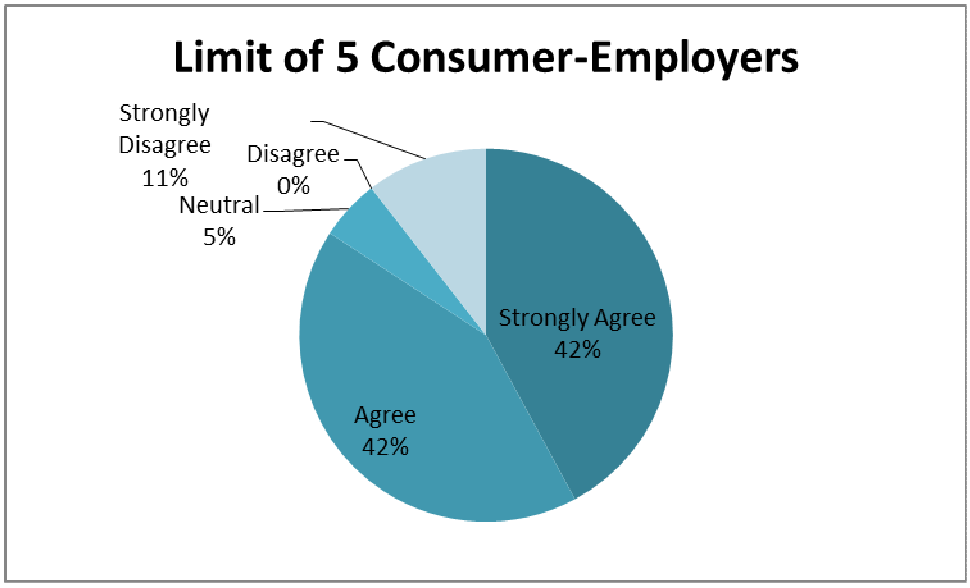
On May 31, 2013, ODA distributed an email survey to every consumer-directed individual provider for which ODA had a valid email address. In doing so, ODA emailed a survey to 41% of its providers (or 298 out of 727 providers). The survey began by announcing that respondents would remain anonymous. The opportunity to complete a survey lasted until June 8, 2013.

Additionally, from June 12, 2013 to June 30, 2013, ODA posted the proposed amendments to the rules and the business impact analysis on its website to seek public comments. On June 12, 2013, ODA distributed an email to subscribers of its email notification service to announce that ODA placed the rules and the business impact analysis on its website to seek public comments.

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

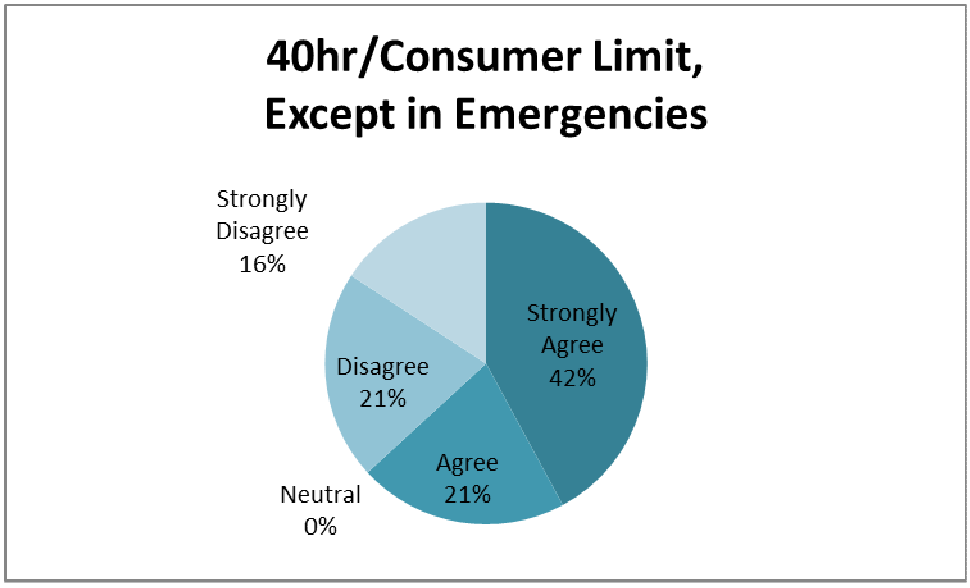
Here are the survey questions and results from ODA's May 31 survey:

1. QUESTION: "ODA would propose a new limit of no more than 5 consumer-employers per consumer-directed provider. As a consumer-directed provider, how much do you agree with this proposal?"



19 consumer-directed providers responded to the question. 2 respondents left additional comments. A respondent who strongly agreed said, "Doing too many long stressful hours/days in a row. Clients not receive good, accurate care." A respondent who strongly disagreed said, "some of these consumers have only 1hr some 3 hr not really worth our time."

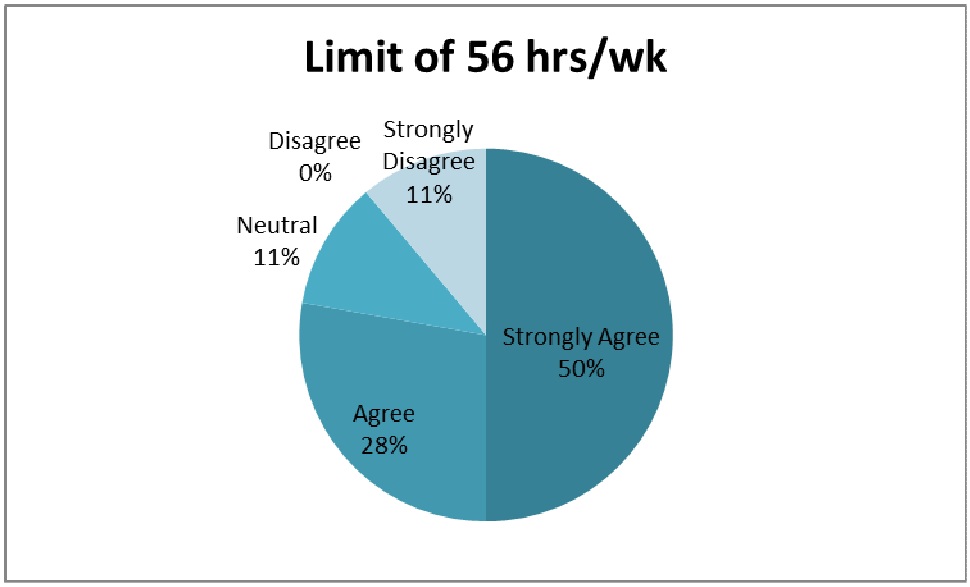
2. QUESTION: "Currently, less than 1% of consumer-directed providers bill the Choices Program for more than 40 hours per week. ODA would propose a new work limit of no more than 40 hours per week for any 1 consumer, except in emergencies. As a consumer-directed provider, how much do you agree with this proposal?"



18 consumer-directed providers responded to the question. 3 respondents left additional comments. A respondent who strongly disagreed said "we are micromanaged enough consumers and providers would do better without these regulations oda needs to spend more time working on the MITS[7] program before creating problems for providers." 2 respondents who disagreed said, "The client may NEED more than 40 hours a week considering the circumstances. Although I would like to see the weekly hours increase from 21 to 27" and "Client may require more than 40 hours of care per week."[8]

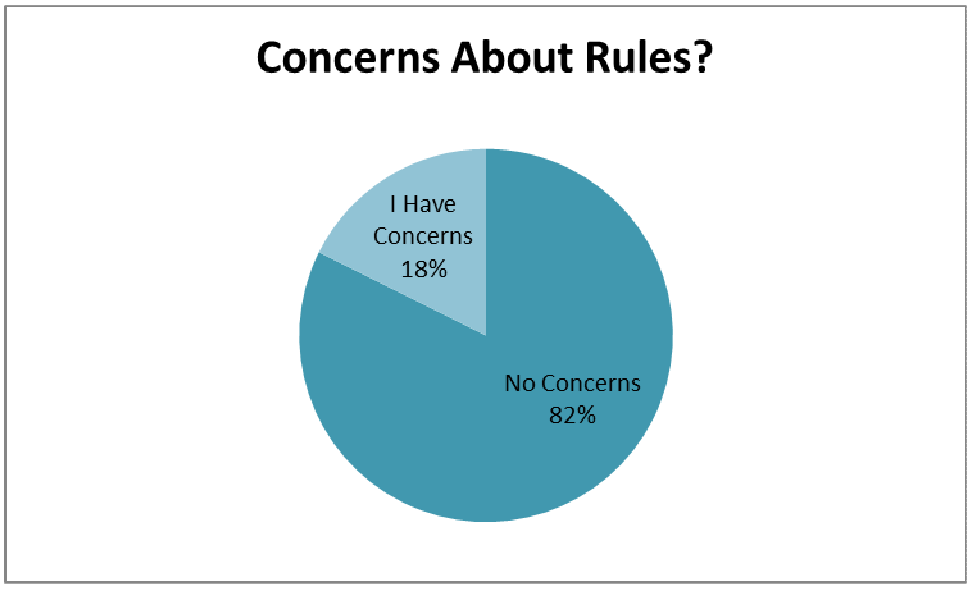
[7] MITS is operated by the Ohio Dept. of Medicaid.
[8] ODA's rule proposal *does* allow a consumer-directed provider to work for more than 40 hours for one consumer in emergency situations.

3. QUESTION: "For consumer-directed providers working for 2-5 consumers, ODA would propose a new work limit of no more than 56 hours per week. As a consumer-directed provider, how much do you agree with this proposal?"



18 consumer-directed providers responded to the question. No respondents left additional comments.

4. QUESTION: "Overall, do you have any concerns with the current language in rules 173-39-02.4 or 173-39-02.21 of the Administrative Code?"



17 consumer-directed providers responded to the question. One respondent left this additional comment: "need to give more money to the care giver ever two week quit takeing (*sp*) from us"

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?

National Association of States United for Aging and Disabilities. "Consumer Directed Personal Care Services: Results of February 2012 Survey on Medicaid Funded Long Term Services and Supports." © March, 2012. This survey revealed that ODA is on par with its counterparts in other states who consider the consumer to be the employer of record.

ODA conducted a survey of its providers. ODA presented the data from this survey under #8.

ODA used statistical data from its records to respond to #14.

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?

ODA did not consider any regulatory alternatives. Respondents to ODA's survey suggested allowing consumer-directed providers to work for more than 40 hours per week for a given consumer when the need was warranted. However, ODA had already proposed to allow working for more than 40 hours per week in emergencies.

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.

The state is considering performance-based regulations. On February 21, 2013, the Governor's Office of Health Transformation announced that Ohio received a federal grant to advance health care payment innovation that would "accelerate the state's work to improve overall health system performance through payment innovation and service delivery improvements...to develop and implement evidence-based health care strategies that improve the health of individuals rather than simply treat disease."[9] However, the review deadline for this rule will precede the outcomes of the state's efforts to develop and implement the evidence-based strategies. Therefore, the present review of rule 173-39-02.21 of the Administrative Code does not implement performance-based regulations.

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

ODA reviewed the Ohio Administrative Code. Section 173.391 of the Revised Code gives ODA the authority to develop requirements for providers who provide services to consumers who are enrolled in ODA-administered programs. No other state agency has adopted such a rule.

[9] Governor's Office of Health Transformation. "Ohio Receives Federal Grant to Advance Health Care Payment Innovation." Press release. © February 21, 2013.

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.

ODA posts all proposed and currently-effective rules on its website. (http://aging.ohio.gov/information/rules/default.aspx) Before a rule takes effect, ODA posts it on its website and sends an email to any subscriber of our rule notification service.

ODA will work with its designees (PASSPORT administrative agencies) to ensure that the regulation is applied uniformly.

ODA and its designees will also monitor the providers for compliance. Rule 173-39-02 of the Administrative Code states that a condition of being an ODA-certified provider is allowing ODA or the PASSPORT administrative agency to monitor the provider.

Business Impact Analysis

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;

Here's a snapshot from the week of March 3, 2013:

- Choices Program: 727 consumer-directed individual providers.
- PASSPORT: 14 consumer-directed personal care service providers.

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

The adverse impact would prohibit consumer-directed individual providers from (1) working for more than 5 consumer-employers per week, (2) working for more than 40 hours per week for 1 consumer-employer, and (3) working for more than 56 hours per week for 2-5 consumer-employers:

- Choices Program: There is no actual adverse impact because the program is not presently paying consumer-directed individual providers to (1) work for more than 5 consumer-employers per week, (2) work more than 40 hours per week for 1 consumer-employer, and (3) work for more than 56 hours per week for 2-5 consumer-employers. (See ODA's response under #14c.)
- PASSPORT: There is no new adverse impact because the rule already prohibits consumer-directed personal care providers from (1) working for more than 5 consumer-employers per week, (2) working for more than 40 hours per week for 1 consumer-employer, and (3) working for more than 56 hours per week for 2-5 consumer-employers. For consumer-directed personal care providers, there would be relief from adverse impact because ODA is proposing to add language to rule 173-39-02.21 of the Administrative Code that would allow the provider to work for more than 40 hours per week for one consumer in emergencies. The current rule only allows for 40 hours per week for one consumer with no mention of emergencies.

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.

The adverse impact for the Choices Program's consumer-directed individual providers would be the proposed prohibitions from (1) working for more than 5

consumer-employers per week, (2) working more than 40 hours per week for one consumer-employer, and (3) working more than 56 hours per week for 2-5 consumer-employers.

Virtually no consumer-directed individual providers are billing for more than 40 hours per week and actually no consumer-directed individual providers are being paid for more than 40 hours per week. As ODA mentioned under #14a, ODA took a snapshot of the consumer-directed providers for the week of March 3, 2013. During that week, only 2 of the 727 consumer-directed individual providers (*i.e.*, roughly ¼ of 1% of those providers) billed the program for more than 40 hours of work. In both cases, the consumers' case managers had not authorized the total hours the providers were billing for in the consumers' service plans; therefore, the Choices Program did not pay for more than 40 hours for that week. This also means that the Choices Program did not pay any consumer-directed personal care provider for working more than 56 hours for that week.

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

As previously stated, ODA is proposing to amend rule 173-39-02.21 of the Administrative Code so that the Choices Program would prohibit consumer-directed individual providers from (1) working for more than 5 consumer-employers per week, (2) working for more than 40 hours per week for 1 consumer-employer, and (3) working for more than 56 hours per week for 2-5 consumer-employers.

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ODA believes this is justifiable for the following reasons:

- It keeps a consumer who receives a home care attendant service safe from an overworked consumer-directed individual provider who may, without the proposed scheduling limitations, seek employment from more than 5 consumer-employers per week, try to work for more than 40 hours per week for one consumer, or try to work for 2-5 consumer-employers for more than 56 hours per week.

- As ODA listed under #14c, virtually no consumer-directed individual providers are billing for more than 40 hours per week and, actually no consumer-directed individual providers are receiving payment for working more than 40 hours per week. This also means that no consumer-directed individual providers billed for more than 56 hours per week. Therefore, the proposed amendment will not result in lost income for consumer-directed providers.

- The proposed amendments would ensure that funds for the Choices Program are not spent on overtime rates.

Business Impact Analysis

Regulatory Flexibility

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

Section 173.391 of the Revised Code, as well as rule 173-39-02.21 of the Administrative Code, do not prescribe alternate means for compliance depending on the size of the business. Additionally, consumer-directed providers are inherently 1-employee businesses.

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?

Section 119.14 of the Revised Code establishes the exemption from penalties for first-time paperwork violations. Disciplinary actions by ODA (or its designees) resulting from non-compliance that is not a pattern of non-compliance is subject to section 119.14 of the Revised Code.

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

PASSPORT administrative agencies (PAAs) and ODA are available to help direct-care providers of any size with their questions about the statutes and rules. Providers may address their questions to the PAAs or to ODA, including to ODA's regulatory ombudsman at rules@age.ohio.gov.