CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Aging (ODA)

Regulation/Package Title: **CRIMINAL RECORDS CHECKS**

Rule Number(s): Chapter 173-9 of the Administrative Code

Date: November 22, 2013
Revised December 20, 2013

Rule Type:

X New:
173-9-01, 173-9-02,
173-9-03, 173-9-03.1,
173-9-04, 173-9-04.1
173-9-05, 173-9-08,
173-9-09, 173-9-10.

X Amended:
173-9-06, 173-9-07.

X 5-Year Review:
Chapter 173-9.

X Rescinded:
173-9-01, 173-9-02,
173-9-03, 173-9-04,
173-9-05, 173-9-08,
173-9-09, 173-9-10.

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

Chapter 173-9 of the Administrative Code contains the requirements to check criminal records when hiring applicants and when reviewing the retention of employees for paid ombudsman positions and paid direct-care positions.

Most rule projects are primarily the result of legislation or ODA's desire to adopt a new public policy in rules according to the authority the legislature already granted to ODA. This rule project is different.

Most of ODA's proposed changes do not propose new public policies. Instead, most of the proposed changes address a year's worth of questions that ODA has received about the chapter. ODA is proposing to replace the current rule language with language that would be less likely to require interpretation. It is ODA's hope that if a reasonable person reads the proposed rules, the person would conclude that the rules basically present the same requirements as the current rules, yet the reader feels more certain that his or her questions about how the rules apply to him and her are resolved without needing to refer to ODA's FAQ page or needing to contact ODA.

Fewer of ODA's proposed changes to the chapter are for the purpose of implementing new public policies. As part of ODA's proposals, it is proposing to implement new public policies enacted by H.B.59 that regulate (1) sub-contractors, (2) AAAs, and (3) PAAs. ODA is also proposing to implement new de-regulation for (4) assisted-living providers, (5) positions that solely involve transporting consumers while working for mass transit systems, and (6) legal services providers. The proposed public policy changes are evident in rules 173-9-01 and 173-9-02 of the Administrative Code.

CONTEXT: ONGOING REFORM IN STATUTES

This rule project is another phase in the ongoing reform of Ohio's criminal records check laws for the long-term care providers. In 2012, ODA collaborated with the Governor, the Ohio Attorney General, the Office of Health Transformation, the Ohio Medicaid Agency [now the Department of Medicaid], the Departments of Developmental Disabilities, Health, and Rehabilitation and Corrections to propose reforms to statutes that require people to undergo criminal records checks if they want to provide direct care to vulnerable Ohioans who are enrolled in our programs. The Ohio General Assembly passed the reforms in H.B.487 (129th G.A.) as amendments to sections 173.27 and 173.394 of the Revised Code. The General

Assembly also passed workforce re-entry reforms in S.B.337 (129th G.A.) and the Common-Sense Initiative in S.B.3 (129th G.A.).

ODA implemented H.B.487, S.B.337, and S.B.3 by adopting Chapter 173-9 of the Administrative Code. The chapter of rules took effect on January 1. Here are the rules' highlights:

- The rules closed many loopholes that previously allowed a state-administered program to permit employing a person in a direct-care position while another state-administered program would have disqualified the same person from the direct-care position due to his or her criminal record. [H.B.487]

- Yet, the rules created new conditions under which long-term care providers could hire a person with a low-level offense on his or her criminal record. [S.B.337]

- The rules also made a consistent experience for long-term care providers who did business (*i.e.*, served consumers) in multiple state-administered programs. The project achieved this by making the rules between the state agencies uniform in their requirements. [S.B.3]

The Governor and ODA were committed enhancing the January 1 statutes to offer greater protections for vulnerable seniors who have enrolled in ODA's programs. To that end, the Governor's Executive Budget presented the following sets of amendments to the legislature:

- One amendment required sub-contractors to undergo criminal records checks, gave authority to ODA and the primary contractors to view the criminal records of the sub-contractors, and required ODA to define "sub-contractor." This amendment would close a loophole through which an agency could fire an employee with a disqualifying criminal record, but bring him or her back into their "employ" by sub-contracting the work to the same person as a self-employed aide.

- One amendment required ODA's director to be the responsible party for conducting criminal records checks on the state long-term care ombudsman.

- Another amendment explicitly required any person who held a direct-care position in an area agency on aging or PASSPORT administrative agency to undergo the same criminal records checks as other employees holding direct-care positions for providers.

- Another amendment sought to increase compliance by replacing terminology that had historically confused certain providers who proclaimed that the law did not require them to conduct criminal records checks. This amendment included the following changes:

- Substituting the term "long-term care *agency*" with "*provider*" to make it clear that self-employed providers, which ODA's Medicaid-funded programs call "non-agency providers," must also comply with the criminal records check laws.

- Replacing the section number that requires criminal records checks so that it is not sandwiched in between other sections of statute that only regulate providers in Medicaid-waiver programs. This helped make it clear that providers who do business with ODA's non-Medicaid programs must also comply with the criminal records check laws.

- Simplifying the lengthy statute by calling the various parties responsible for conducting criminal records checks the "responsible parties."

The legislature incorporated the Executive Budget's language into H.B.59 (130th G.A.). Before passage, the legislature further amended the bill by exempting certain transportation providers and assisted living providers, then enacted.

GOALS OF THIS RULE PROJECT

This project has 4 goals:

1. Increasing readers' comprehension by rewriting the rules with language that would be less likely to require interpretation, especially in areas that would address FAQs.

2. Implementing H.B.59's policy amendments to sections 173.27 and 173.38 of the Revised Code, which explicitly require sub-contractors, AAAs, and PAAs to conduct criminal records checks, but exempt direct-care positions in assisted-living facilities and positions transporting consumers while solely working for a mass transit provider.

3. Miscellaneous amendments.

4. Maintaining unity with the collaboratively-formed rules from January 1.

GOAL 1: Increase readers' comprehension by rewriting the rules with language that would be less likely to require interpretation, especially in areas that would address FAQs:

ODA received many questions and comments about Chapter 173-9 of the Administrative Code in the months before and after the adoption of Chapter 173-9 of the Administrative Code on January 1, 2013. The many questions and comments

convinced ODA to create a webpage to respond to the FAQs. In December, 2012, ODA compiled the FAQs and developed a webpage of FAQs for its criminal records check rules. ODA added more FAQs, but not all FAQs to the page throughout 2013.

This webpage has been one of the most-viewed pages on ODA's website. Throughout 2013, ODA used Google Analytics to monitor the traffic on that page.

Google Analytics captured the number of views of the page per month.

MONTH	PAGEVIEWS	AVE. TIME ON PAGE
December[1]	760	4:39 minutes
January	1,140	4:12 minutes
February	1,559	3:45 minutes
March	1,863	2:53 minutes
April	1,129	2:37 minutes
May	827	2:53 minutes
June	527	2:42 minutes
July	1,135	2:57 minutes
August	802	2:07 minutes
September	728	2:30 minutes
October	770	1:58 minutes

Google Analytics also captured the number of views of the criminal records check rules per month. As one can see in the table below, in October, the public viewed the FAQ page *12x more often* than the most-viewed criminal records check rule.

FAQs/RULE	OCTOBER PAGEVIEWS	OCTOBER AVE. TIME ON PAGE
FAQs	770	1:58 minutes
173-9-01	24	2:10 minutes
173-9-02	19	1:49 minutes
173-9-03	63	4:01 minutes
173-9-04	39	1:36 minutes
173-9-05	13	0:33 minutes
173-9-06	35	2:12 minutes
173-9-07	49	1:45 minutes
173-9-08	20	2:17 minutes
173-9-09	8	0:50 minutes
173-9-10	11	2:06 minutes

Google Analytics indicated that the public was relying heavily on the FAQ page to understand the law. ODA used this evidence to justify rewriting the rules with language that would be less likely to require interpretation.

[1] The FAQ webpage was created in the middle of the month.

Rather than only respond to FAQs on a FAQ webpage, ODA is proposing to take this opportunity to respond to FAQs by amending the rules themselves. In doing so, ODA is proposing to retain the same requirements, but to write them in language that is more readable.

Throughout the chapter, ODA is proposing to use language that would be less likely to require interpretation that also addresses many of the FAQs, including the FAQs listed below:

- “How is ‘direct-care position’ defined?”
- “Are there exemptions to the requirement to conduct post-hire checks on employees?”
- “What about assisted living facilities?”
- “What about other job positions?”
- “Do volunteers require checks?”
- “Where can I find the databases?”
- “If a responsible party conducts a criminal records check, can it skip the database reviews?”
- “Are responsible parties required to review databases for employees (post-hire) before conducting criminal records checks?”
- “What is the deadline for completing criminal records checks on applicants (pre-hire)?”
- “What is the deadline for completing criminal records checks on employees (post-hire)?”
- “What about multiple offenses?”
- “May responsible parties retain the roster electronically?”
- “May responsible parties retain criminal records electronically?”

Criminal records check law is inherently complex. ODA is proposing to replace language that seems to require interpretation with language that doesn’t require interpretation. ODA is proposing to do the following:

- **Tables:** As mentioned earlier for FAQs, ODA is proposing to add tables that explain the text. The tables do not contain material not in the rules' texts. However, they may increase the comprehension of readers who are visual learners.

- **Run-on sentences:** Like many state agencies, ODA has traditionally adopted rules with sentences that run through multiple paragraphs. The following is a simple example:

  (A) The responsible party shall:

  (1) Open the window;

  (2) Open the door; and,

  (3) Open the vent.

  The run-on sentences become difficult to follow when exceptions are added to individual paragraphs. The following is an example:

  (A) The responsible party shall:

  (1) Open the window;

  (2) Open any door that:

  (a) Is made of wood; or,

  (b) Is made from a wood composite.

  [We cannot add "; and," to this sentence structure.]

  (3) Open the vent.

  Of course, run-on sentences in complex rules aren't normally as simple as the examples above. This emphasizes the benefits of ceasing to use run-on sentences. In the place of most run-on sentences, ODA is proposing to use the following a numerical "bullet-point" format:

  (A) The responsible party shall open the following three portals:

  (1) The window.

  (2) Any wood or wood-composite door.

  (3) The vent.

  Practically, using "bullet-point" format would involve inserting "the following [insert number] [insert object]" before the list begins and replacing semicolons and conjunctions in the list with periods. Legally, there would be no difference in the text's meaning.

- **Main points first:** ODA is proposing to place main points first, followed by a list of conditions (*i.e.*, right-branching) instead of placing main points after a list of conditions (*i.e.*, left branching). For examples of this simplification strategy, see the multiple-offense language in rule 173-9-07 of the Administrative Code and the new appearance of the 60-day limitation on conditional hiring at the beginning of rule 173-9-05 of the Administrative Code.

- **Simpler words:** ODA is proposing to substitute legalisms, multi-syllable words, and verbose phrases with simpler words and phrases. The following are examples:

    - Replace “individual” with “person.”

    - Replace “position that involves providing ombudsman services to residents and recipients” with “ombudsman position,” then define “ombudsman position.”

    - Replace “employ an applicant” with “hire an applicant.”

    - Replace “employ an employee” with “retain an employee.”

    - Replace “terminate the employee” with “fire the employee.”

    - Replace “terminate the conditionally-hired applicant” with “release the conditionally-hired applicant.”

- **Redundancies:** ODA is proposing to use “criminal record(s)” instead of “criminal records check report,” “report of the criminal records check,” and “results of the criminal records check.” That is because “report” and “results” are redundant of “record(s).”

- **Excessive internal references:**

    - ODA is proposing to define “database reviews” in rule 173-9-01 of the Administrative Code as “database reviews conducted according to rule 173-9-03 of the Administrative Code.” This will eliminate need to use “free database reviews under rule 173-9-03 of the Administrative Code” throughout the chapter. Part of this simplification is dropping the word “free.” Truly, the database reviews are free, but the adjective does not add to one’s understanding of the chapter.

    - ODA is proposing to define “criminal records checks,” “checks,” and “criminal records” in ways that do not require using “criminal records checks that are conducted under Chapter 173-9 of the Administrative Code” or “criminal records check report” so often in the rules.

- **Excessive external references:** ODA is proposing to not cite sections of the Revised Code in the text of the rules as support for the rule. The "rule amplifies" section at the end of the rules (once filed with JCARR) should provide sufficient citation.

- **Excessive qualifying information:** Because ODA has defined "applicant" and "employee" in rule 173-9-01 of the Administrative Code a person who applies to fill, or presently fills, an ombudsman position or direct-care position, ODA does not need to repeat "ombudsman position" and "direct-care position" throughout the rule.

- **Lengthier definitions:** The exemption language in the definition of "direct-care position" in section 173.38 of the Revised Code says that the only kind of transportation position that is exempt from being considered a direct-care position is the position that is regulated under Chapter 306 of the Revised Code. For clarification, ODA has added language to explain that this refers to 3 types of mass transit drivers.

- **Active voice:** ODA is proposing to convert a substantial amount of passive-voice language into active-voice language. This proposal would allow ODA to clearly state a sentence's subject without adding subordinate clauses that can complicate paragraphs and reduces reader comprehension. ODA's proposal complies with §5.8.6 of the Legislative Service Commission's "Rule Drafting Manual."[2]

- **Possessive pronouns and contractions:** ODA is proposing to use possessive pronouns and possessive contractions to reduce the prolific use of "of the [X]" throughout the chapter.

- **Migrating limited-applicability language from rule 173-9-04 of the Administrative Code to rule 173-9-02 of the Administrative Code:** The exemption language doesn't fit perfectly into any rule. However, based upon the FAQs, it seems the public was looking for this language in rule 173-9-02 of the Administrative Code instead of where ODA placed it in the rules that ODA adopted on January 1, which was in rule 173-9-04 of the Administrative Code. ODA is now proposing to move this language to rule 173-9-02 of the Administrative Code.

- **Delineating language for the self-employed:** ODA is proposing to simplify rule 173-9-04 of the Administrative Code by extracting the language for the self-employed and adding it to new rule 173-9-04.1 of the Administrative Code. Additionally, ODA did not address the self-employed in current rule 173-9-03 of the Administrative Code, but should have done so. Therefore, ODA is also proposing to create a new rule 173-9-03.1 of the Administrative

[2] Ohio Legislative Service Commission. "Rule Drafting Manual." 4th Edition. © May, 2006.

Code so that rule 173-9-03 of the Administrative Code can remain as simple as possible.

- **Remove confusing words:** Providers asked for clarification on retaining records electronically when rule 173-9-08 of the Administrative Code required "official" and "original" copies. ODA intended for the copies to be just that: copies. Therefore, ODA is proposing to amend rule 173-9-08 of the Administrative Code to remove the occurrences of "original copy" and "official copy."

GOAL 2: Implement H.B.59's amendments: H.B.59's amendments to sections 173.27 and 173.394 of the Revised Code took effect on September 29, 2013. ODA is proposing to amend Chapter 173-9 of the Administrative Code to implement the following H.B.59 amendments:

- ODA is proposing to update citations in the rules to reflect the bill's renumbering. This includes renumbering section 173.394 of the Revised Code with section 173.38 of the Revised Code.

- ODA is proposing to use H.B.59's amended terminology. One of the terminology changes requires ODA to switch from "direct care" language to "direct-care position" language. Although the amended terminology doesn't amend the rules' effect, it does require ODA to alter sentence structures throughout the rules. H.B.59 also changed other terminology to "provider" and "responsible party," which simplified the statute and rules and made it more evident that self-employed providers are responsible parties.

- ODA is proposing to add language to verify that H.B.59 exempted positions that only involve transporting persons while working for a county transit system, regional transit authority, or regional transit commission.

- ODA is proposing to add language to verify that H.B.59 exempted direct-care positions in assisted living facilities from Section 173.38 of the Revised Code.

- ODA is proposing to verify that H.B.59 considers sub-contractors to be responsible parties and requires ODA to define "sub-contractor."

GOAL 3: Miscellaneous amendments:

- **Legal Services:** ODA is proposing to add language to rule 173-9-02 of the Administrative Code to exempt legal services providers from Chapter 173-9 of the Administrative Code.

- **FBI checks and conditional hiring:** ODA is proposing to add language to rule 173-3-05 of the Administrative Code language to explain the relationship between FBI checks and conditional hiring. This language appeared in

sections 173.27 and 173.394 [now "173.38"] of the Revised Code, but not in ODA's rule. This will address a matter raised by a provider.

- **Employment-service referrals and conditional hiring:** ODA is proposing to add language to rule 173-9-05 of the Administrative Code on how to handle conditional hiring when an employment service refers the applicant to the provider.

Goal 4: Maintain unity with the collaboratively-formed rules from January 1: An outcome of the collaborative that created the January 1 rules was unity between the criminal records check requirements between the statutes and rules of four state agencies. ODA wants to maintain the general unity between the statutes and rules of four state agencies. With one exception, ODA is unaware of any amendments that ODA is proposing that would change that unity.

Through H.B. 59, the legislature enacted the following 2 items that work against the unity of the 4 state agencies' statutes and rules:

- The legislature now allows *consumers* who are enrolled in ODM-administered Medicaid waiver programs to have access to the results of the criminal records checks of provider's employees. The statutes for the other programs prohibit the sharing of the results except to certain persons, such as the applicant.

- The legislature granted the request of a regional transit authority to exempt mass transit providers from section 173.38 of the Administrative Code. However, the same providers are not exempt from any other state agencies' criminal records check requirements. Thus, while ODA will not monitor nor enforce criminal records check laws on such providers, any time a mass transit provider drives a consumer who is enrolled in a program under the Ohio Departments of Developmental Disabilities or Medicaid[3], the provider shall comply with the criminal records check laws for those departments' programs.

MISCELLANEOUS

For the purposes of this BIA, a provider of community-based long-term care services is an Ohio business that faces an adverse impact, as "adverse impact" is outlined in section 107.52 of the Revised Code.

Because this rule projects builds upon the foundation of the January 1 rules, because the collaboration of state agencies went to lengths to calculate and to explain the adverse impact, and because this rule project should not change the

[3] The Ohio Department of Health does not regulate transportation services for community-based long-term care services.

adverse impact calculated for the January 1 rules, this BIA is largely based upon the former BIA and makes significant references to it.

Also, because H.B.59's amendments requires amending each rule of the chapter, the amendments to this chapter will also satisfy ODA's requirements to comply with the review in section 119.032 of the Revised Code, which requires reviewing each rule no less often than once every five years.

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

- The primary statutes that authorize (and mandate) ODA to adopt criminal records check rules are sections 173.27 and 173.38 of the Revised Code. H.B.59 (130th G.A.) amended both of these statutes and renumbered "173.394" as "173.38."

- Sections 173.01, 173.02 of the Revised Code give ODA general authority to adopt the rules.

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.

For providers of services under ODA's programs that use Medicaid funds, 42 C.F.R. 455.414, 455.434, and 455.436 require the Dept. of Job and Family Services to ensure that each provider's criminal record and record in certain national databases is checked at least every five years. 42 C.F.R. 455.452 specifically allows the state to establish "provider screening methods in addition to or more stringent than those required by this subpart." Nevertheless, ODA and the Departments of Developmental Disabilities, Health, and Job and Family Services settled on a five-year requirement which is no more frequent than that required under 42 C.F.R. 455.414.

For providers of ombudsman services or direct care under ODA's programs that do not use Medicaid funds, Sections 305(a)(1)(C) and 712(a)(5)(D) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended, and 45 C.F.R. 1321.11 give ODA federal authority to adopt rules, but those statutes do not require ODA to adopt rules regarding criminal records checks.

Sections 173.27 and 173.38 of the Revised Code do not treat any provider differently regarding criminal records checks, whether they provide ombudsman services, direct care under a Medicaid-funded program, direct care under a non-Medicaid program, or—as is most common, direct care under both Medicaid and non-Medicaid programs.

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 new criminal records check rules are not the result of a 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)?**

   The public purpose for the Chapter 173-9 of the Administrative Code is the same as that of the January 1 version of the chapter. As ODA stated in the BIA for the January 1 rules:

   > H.B.487's amendments to sections 173.27 and 173.394 of the Revised Code *require* ODA to adopt rules to implement the sections. As stated by Attorney General Mike DeWine in his letter of December 21, 2011, "[I]t is paramount to the safety of ... vulnerable citizens that we prohibit certain types of criminals from entering into patients' homes." He also said, "I urge you to work together to create one set of comprehensive rules in a manner that eliminates loopholes and provides full protection to Ohio's most vulnerable citizens." In Greg Moody's response, he said, "These efforts will align with broader OHT initiatives to assure the safety and quality of home and community based services that are critical to health transformation in Ohio."

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 responsible parties 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.

Over the past year, ODA made a special effort to engage stakeholders through special events regarding Chapter 173-9 of the Administrative Code. Here is a list of events:

- **Ohio Council for Home Care and Hospice:** Webinar with Q&A; November 5, 2012.
- **Area Agencies on Aging and PASSPORT Administrative Agencies:** Presentation; November 10, 2012.
- **Southwest Ohio Area Network (SWOAN):** Webinar with Q&A; January 3, 2013.
- **91 Mansfield-area providers (hosted by AAA5):** 2 seminars with Q&A; January 31.
- **Ohio Senior Center Association:** Monthly meeting; April 11, 2013.
- **Ohio Assisted Living Association:** spring conference; seminar with Q&A; May 20, 2013.
- **Ohio Association of Medical Equipment Suppliers:** 33rd Annual Meeting & Exposition; seminar with Q&A; November 19, 2013.

ODA also emailed responsible parties about the proposed amendments for Chapter 173-9 of the Administrative Code.

First, ODA asked for input on implementing H.B.59's amendments into Chapter 173-9 of the Administrative Code. ODA accomplished this by emailing the following providers, AAAs, and PAAs on June 7, 2013:

- Ali Residential Services
- Americare Home Health Care
- Ashland County Council on Aging
- Brethren Care Village
- Guernsey Seniors
- Health and HomeCare Concepts
- Health Resources Alliance/Alliance Rehab
- Home Care by Black Stone
- Interim Health Care

- Kaiser Wells Pharmacy and Home Care
- Legal Aid of Western Ohio, Inc.
- Licking County Aging Program
- LifeCare Alliance
- Lutheran Metropolitan Ministry
- Medical Service Company
- Midwest Care Alliance
- Morrow County Services for Older Citizens, Inc.
- Ohio Association of Medical Equipment Suppliers
- Ohio Association of Senior Centers
- Ohio Council for Home Care and Hospice
- Personal In-Home Services
- Progressive Health Care Services
- Seneca County Commission on Aging
- Senior Resource Connection
- Shepherd of the Valley
- Simply-EZ Home-Delivered Meals
- Superior Care Plus
- Sycamore Senior Center
- United Seniors of Athens County
- Valued Relationships, Inc. (VRI)
- Wesley Community Services
- Wood County Council on Aging
- Wyandot County Council on Aging (Wyandot Seniors?)
- Ohio Association of Area Agencies on Aging
- Council on Aging of Southwestern Ohio (planning and service area (PSA) 1)
- Catholic Social Services of the Miami Valley (PSA2)
- Area Agency on Aging 3 (PSA3)
- Area Office on Aging of Northwestern Ohio, Inc. (PSA4)
- Ohio District 5 Area Agency on Aging, Inc. (PSA5)
- Central Ohio Area Agency on Aging (PSA6)
- Western Reserve Area Agency on Aging (PSA10A)
- Area Agency on Aging 10B, Inc. (PSA10B)

Here is the text of ODA's email:

> Pending H.B.59 passed both the House and Senate, but is likely to go to a conference committee before both the House and Senate agree to the final version of the legislation.
>
> The legislation, as it now stands, would make multiple amendments to the criminal records check statutes that regulate providers that serve consumers who are enrolled in ODA-administered programs. The statutory amendments would require ODA to make corresponding amendments to Chapter 173-9 of the Administrative Code.
>
> The amendments to H.B.59 would take effect 90 days after Governor Kasich signs the bill into law. If the Governor signs the legislation on July 1, the effective date would be September 29.

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ODA's corresponding amendments to Chapter 173-9 of the Administrative Code should take effect on the same day as H.B.59. However, the rule-development process is longer than 90 days. Therefore, ODA will initiate the Common-Sense Initiative portion of the rule-development process as H.B.59 undergoes its final stages before enactment.

In the table below, I have listed the components of H.B.59's amendments to the criminal records check laws for direct-care programs that ODA administers. To prepare a business impact analysis for the Common Sense Initiative Office, I am requesting that you let me know if you see blessings, see problems (including financial impacts to the businesses you represent), or have questions about the amendments. Your comments may help shape the development of the rules.

Amendments in (pending) H.B.59	**Corresponding Amendments to Rules of Chapter 173-9 of the Administrative Code**
Sub-contractors: • Sub-contractors would be required to conduct criminal records checks. This would eliminate potential loopholes that would allow: (1) a responsible party to fire a direct-care staffer, then sub-contract to hire the same person as a self-employed sub-contractor; (2) a responsible party to become terminated, then to continue to provide services under the radar as a sub-contractor agency working for a non-terminated agency provider; (3) a disqualified person to provide a lesser used service to a provider agency that offers a service, but has no employees on hand to furnish it. • ODA would be required to define "sub-contractor" in rule. • Sub-contractors would be required to supply criminal records reports to ODA and others for monitoring.	Sub-contractors: 173-9-01: • ODA must determine the best way to define "sub-contractor." A strategy has not yet been determined. Here are some possibilities: • Sub-contractor is any person who substitutes for a direct-care staffer by performing the general duties of direct-care staffer (*i.e.*, a back-up aide). • Responsible party performing the service of another responsible party. (*e.g.*, A senior center may offer chore services, but may not receive enough chore service referrals to justify employ chore personnel. As a result, the senior center sub-contracts with others to provide the general duties of its chore service.) • Sub-contractor who supplies goods to the provider would not be a sub-contractor. (*e.g.*, Should a food supply company that drops off food to kitchen be considered a sub-contractor to a meal provider for the purpose of criminal records checks? (Probably not.) Should a cement-mixing company that pours cement into holes at a work site be considered a sub-contractor to a home-modification service

Business Impact Analysis

Amendments in (pending) H.B.59	Corresponding Amendments to Rules of Chapter 173-9 of the Administrative Code
	provider who is building a wheelchair ramp? (Probably not.)) 173-9-04: Require sub-contractors to conduct criminal records checks. 173-9-08: ODA and others would have ability to monitor the criminal records of the sub-contractors.
"Direct-care position" definition: • Would appear in statute. • Would include an amendment that exempts urban mass transit drivers from the definition of "direct-care position."	"Direct-care position" definition: 173-9-01: Amend definition to exempt urban mass transit drivers from the definition.
Assisted Living: • Would exempt assisted living providers from the authority of the criminal records check laws for providers that serve consumers who are enrolled in ODA-administered programs. • Would still allow ODA to view criminal records reports obtained to comply with the criminal records check laws for RCFs for the Ohio Dept. of Health.	All rules: ODA should amend accordingly.
AAAs and PAAs: Explicitly requires all staff at AAAs and PAAs that hold a direct-care position to undergo criminal records checks.	173-9-02: ODA should amend accordingly.
Terminology changes in §§ 173.38, 173.39, 173.391, and 173.392: • Clear that all provider types are subject to law. (*i.e.*, no longer calls non-agency and consumer-directed providers "community-based long-term care agencies.") • Calls each type of provider "provider." • Calls each party responsible for conducting checks "responsible party."	173-9-01: ODA should amend accordingly. All rules: ODA's rules already use the universal term "responsible entity" instead of "community-based long-term care agency" to refer to providers and others. All rules: ODA should replace "responsible entity" with "responsible party."
Reference change: Section 173.394 would become section 173.38.	All rules: ODA should amend rules accordingly.
Federal database: "EPLS" database would be named "SAM" because the federal government changed the name of the database to the System for Award Management.	173-9-03: ODA's rule already uses "SAM" instead of "EPLS"

Business Impact Analysis

Amendments in (pending) H.B.59	Corresponding Amendments to Rules of Chapter 173-9 of the Administrative Code
NA	ODA could clean up rules at same time so long as the result agrees with the statute: 173-9-02: • Missing punctuation in (A)(2)(f). • Clarification on legal services providers? 173-9-04: • Clarification in (B)(1): "...this rule does not require the responsible ~~entity~~ party to ~~check~~ conduct subsequent checks on the person as an employee." • Clarification in (B)(3): "the reverification of a criminal records check has the same validity as ~~a~~ the original criminal records check." • Clarification in (C)(3): Replace the sub-title "Frequency" with "Subsequent reviews and checks." • (F)(2) and (F)(2)(a): "applicant and employee"? (*cf.*, (F)(3) of §109.572) 173-9-07: • Correct citation: "(B) ~~and (C)~~, (C), and (D)" • (A)(4)(a): "any" à "an" • (A)(4)(a)(xliii): "nay" à "any" • (B): convert to past tense or delete? 173-9-08: • No requirements for *written* records when electronic records would suffice: • (B)(1)(a)(ii): "~~The original copy of any~~ Any criminal records report or ~~the original copy of~~ any reverified criminal records report." • (B)(1)(a)(iv): "An ~~official~~ copy of a certificate of qualification for employment, if a court issued a certificate of qualification for

Amendments in (pending) H.B.59	Corresponding Amendments to Rules of Chapter 173-9 of the Administrative Code
	employment to the employee." • (B)(1)(a)(v): See pattern for paragraph (B)(1)(a)(iv). • (B)(1)(a)(vi): See pattern for paragraph (B)(1)(a)(iv). • What else do *you* see?

By the way, "rapback" is a topic that many state agencies and the Attorney General's office will begin to implement in 2014. We will do so through subsequent rule changes (and, if necessary, statutory changes).

Thank you for your time.

ODA documented the responses it received in #8 of this BIA.

Second, ODA sought for input on a draft of ODA's proposed language to define "sub-contractor." ODA accomplished this by emailing the following to the Ohio Association of Senior Centers and Midwest Care Alliance on October 16, 2013:

ODA's proposed new criminal records check rules have 3 basic goals: (1) implement H.B.59's changes, (2) increase reader comprehension by addressing FAQs and by simplifying language, and (3) remain uniform in content with the rules of our collaborating state agencies.

One of H.B.59's changes involves considering sub-contractors as parties that are responsible for conducting their own criminal records checks. Months ago, we polled providers and provider associations for feedback on the forthcoming rules. Providers and associations showed more interest in defining "sub-contractor" than anything else and provided feedback about not defining the term so broadly that businesses far removed from direct care would require criminal records checks. Based upon that input, our present proposal is the first two sentences of the text below:

"Sub-contractor" means a party that enters into a contract with a responsible party to provide a component of one or more of the responsible party's direct-care positions. "Sub-contractor" does not include a party that only supplies goods to the responsible party, but does not supply goods to the consumer.

"Sub-contractor" includes the following four examples:

A self-employed dietitian who performs components of nutrition services for multiple responsible parties.

A self-employed carpenter who builds wheelchair ramps for a responsible party that offers home-modification services, but does not have enough home-modification business to hire the carpenter as an employee.

A nursing agency that supplies nursing services to multiple responsible parties who do sub-contract for nursing services rather than hire the nurses to be the responsible parties' employees.

An agency that performs the installation components for a responsible party's home medical equipment service.

"Sub-contractor" does not include the following three examples:

A party that supplies goods to the primary responsible party, but not directly to the consumer. This includes a wholesale kitchen that supplies meals to a responsible party that delivers meals. This also includes a lumber yard that supplies wood to a responsible party that offers home-modification services.

An employment service that refers applicants to a responsible party for the responsible party to consider hiring.

An employment service that refer to the responsible party temporary employees who remain employees of the employment service.

As you can see, we are also considering listing examples. That could help or could cause trouble for providers. If providers feel a need to ask for more examples, it would be an indication that they're not using the definition, but counting on the examples to be the "rule." We want to avoid that.

ODA is about ready to start a public-comment period for its proposed new criminal records check rules—perhaps at the end of this week or next week. I thought I'd ask for another round of input on one matter before the comment period. For expediency, I'm only going to ask a couple stakeholders this follow-up request. If you have any thoughts that you can share on this definition and the idea of examples, please let me know. We'd value your input.

Thank you for your time.

ODA documented the response it received in #8 of this BIA.

Third, ODA sought for input on a draft of ODA's proposed redraft of rule 173-9-05 of the Administrative Code regarding conditional hiring. To accomplish this, ODA emailed a question to Area Office on Aging of Northwestern Ohio, Inc. on October 16, 2013, because the Area Office on Aging had previously emailed a request for clarification on the current rule to ODA. Here's the part of the email that applies:

While I have you, you're invited to be a test pilot for a new rule.

One of the big projects on the table right now is the proposed new criminal records check rules. The three goals of the project are to (1) implement House Bill 59's changes to the criminal records check law, (2) increase reader comprehension by addressing FAQs and by simplifying language, and (3) maintain content unity with the collaborating state agencies.

Regarding (2) above, we've drafted a new version of the rule on **conditional hiring**. If you have time, take a look at the proposed new rule. It's the one with the blue text. I also included the current rule for comparison. It's the one with the black text.

If the proposed rule was the one you followed instead of the current rule, would you have needed to ask today's question? Please let me know what you think and if the rule still generates questions for you.

THANK YOU for your time.

ODA documented the response it received in #8 of this BIA.

Fourth, ODA sought for input on a draft of ODA's proposed redrafts of rules 173-9-02 and 173-9-04 of the Administrative Code regarding post-hire criminal records checks. To accomplish this, ODA emailed a question to Menorah Park Center for

Senior Living on October 23, 2013, because Menorah Park had previously emailed a question to ODA on the same topic. Here's the part of the email that applies:

> I have attached a copy of our proposed NEW VERSIONS of rules 173-9-02 and 173-9-04 of the Administrative Code. In the highlighted text, we tried to make it easier to understand this matter that is not easy to understand. If you're willing, please take a look at the proposed new rules and email us back to let us know if the proposed new language would have resolved your question without having to ask us for clarification.
>
> Thank you for considering our request to give us feedback on the proposed new rules. Have a great afternoon!

ODA documented the response it received in #8 of this BIA.

On November 19, 2013, ODA made a presentation and Q&A session on the proposed new rules to the 33rd Annual Meeting and Exposition of the Ohio Association of Medical Equipment Suppliers.

Additionally, throughout 2013, ODA had frequent contact with providers who are regulated by this rule. Because of the frequency of the questions, ODA was able to develop a webpage of FAQs for criminal records checks.

From November 22, 2013 to December 8, 2013, ODA posted this BIA and the proposed new rules on its website for a public-comment period.

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

Even before the January 1 laws took effect, ODA had noticed patterns in the questions and comments that helped ODA identify areas of the rules that could use clarification. ODA's immediate solution was to create a FAQ page for the criminal records check rules. This page became one of the most-viewed pages on ODA's website. As mentioned in ODA's response to #1 of this BIA, ODA is proposing to replace the current rule language with language that would be less likely to require interpretation. It is ODA's hope that if a reasonable person reads the proposed rules, the person would conclude that the rules basically present the same requirements as the current rules, yet the reader feels more certain that his or her questions about how the rules apply to him and her are resolved without needing to refer to ODA's FAQ page or needing to contact ODA.

United Seniors of Athens County, a provider, testified at the December, 2012 meeting of the Joint Committee on Agency Rule Review (JCARR). He testified that it was not clear what the deadline was for completing the criminal records check on employees. Rule 173-9-04 of the Administrative Code said the deadline was no later than 30 days after every fifth anniversary of each employee's date of hire (*i.e.*, 5 years + 30 days). The provider thought that the rule said the provider had only 30 days to complete the records checks every five years. Instead, ODA's FAQ page said that the rule did not prohibit a responsible party from conducting a criminal records check before the deadlines nor did it require a responsible party to wait until

a specified day to conduct a criminal records check. Now, ODA is proposing to simplify rule 173-9-04 of the Administrative Code by deleting the examples, by adding "(*i.e.*, five years plus thirty days)," and by adding a statement that the rule does not prohibit a responsible party from conducting a criminal records check before the deadline nor does it require waiting until a specified day to conduct the check.

Early this year, ODA also worked with the Governor's office to request that the legislature simplify the language regarding criminal records checks for ODA-administered programs. The Governor added the language to his Executive Budget, and the legislature incorporated it into H.B.59. The language took effect on September 29.

Throughout the year, area agencies on aging expressed confusion about why rule 173-9-02 of the Administrative Code said that those whose direct-care position only involved delivering meals, having access to consumers' records, or performing a once-ever service were subject to the criminal records check requirements, when rule 173-9-04 of the Administrative Code said that the same people were not subject to post-hiring checks. ODA is proposing to clarify this matter by proposing to adopt a new version of rule 173-9-02 of the Administrative Code. ODA's proposed new rule explicitly states that the chapter has limited applicability to such direct-care positions. The applicability is limited because a person is subject to the criminal records check requirements when the person is *an applicant* under final consideration for employment in a direct-position, however the person is not subject to a post-hire criminal records check (*i.e.*, as *an employee*) unless the person acquires a direct-care position other than delivering meals or having access to consumers' records, or performing a once-ever service.

Throughout the year, providers asked if the rules required reviewing the six free databases before requesting a criminal records check on an existing employee. The existing rules required checking the six free databases before performing any criminal records check. Because the information on one of the databases could disqualify an existing employee from continuing to hold a direct-care or ombudsman position, it has also been in the financial interest of the provider to conduct these checks. ODA is proposing to clarify this matter by proposing to adopt a new rule 173-9-03 of the Administrative Code. The new rule would explicitly say that the responsible party shall review the databases before checking the criminal records of applicants (*i.e.*, pre-hire) *and* employees (*i.e.*, post-hire).

Throughout the year, providers asked for clarification on retaining records electronically when rule 173-9-08 of the Administrative Code required "official" and "original" copies. ODA intended for the copies to be just that: copies. Therefore, ODA is proposing to amend rule 173-9-08 of the Administrative Code to remove the occurrences of "original copy" and "official copy."

On June 7, the Ohio Association of Senior Centers said,

> Everything in here looks reasonable to me. I just want to make sure that sub-contractors of goods are not included in the criminal background checks rule. Although it says they will not, in the examples given it says 'probably not.' It would be ludicrous to include them.
>
> Also, if I interpret it correctly, it appears that Assisted Living Facilities are exempt because they are required by the Dept. of health to conduct criminal background checks and it would be a duplication to also have ODA require them. If that's the case, then I'm OK with that too.
>
> Thanks for giving us the opportunity to review these changes.
>
> **RESPONSE:** ODA will add language to the rules to the definition of "sub-contractor" in the rule to make this clear.

On June 7, the Western Reserve Area Agency on Aging said, "Thank you...; I see no problem."

On June 10, 2013, the Ohio Association of Medical Equipment Services (OAMES) said, "Thank you for the information.... We will review." OAMES subsequently invited ODA to address its members on this topic as a guest speaker of its 33rd Annual Meeting & Exposition on November 19.

On June 10, the Wyandot County Council on Aging said,

> As far as we are concerned at the Wyandot County Council on Aging, our main issue with HB 59 would be the position on direct care. I will suppose for the sake of conversation that anyone that provides transportation to seniors over 60 years of age engages in 'urban mass transit.' If that is indeed the case then I am in total agreement with the exemption of these employees from the title of "direct-care."
>
> With our agency, transit drivers conduct the same door-to-door policy as what exempts home-delivered meal drivers. We are at the door but do not enter the home.
>
> I appreciate your sending of this information to me, as I do believe that home-delivered meal drivers and transit drivers should be listed as positions that do not provide direct care.
>
> **RESPONSE:** The origin of the amendment was this: The Portage Area Transit Authority lobbied legislators to exempt their drivers from the definition of "direct-care position." The resulting exemption in H.B. 59 (130th) does not refer to any rationale to support this. The exemption in section 173.38 of the Revised Code does not say the exemption is for those who go door-to-door. It says it is for drivers regulated by Chapter 306 of the Revised Code.
>
> To eliminate any confusion on which types of drivers are subject to criminal records checks, ODA will add language to clarify that H.B. 59 exempted only certain transportation drivers from the definition of "direct-care position." Those who deliver meals and other transportation drivers perform "direct care" as defined by section 173.38 of the Revised Code.

On June 10, the Simply-EZ Home Delivered Meals said the following:

> After reading your email I don't think Simply EZ will be affected by any of the changes. We do not use sub-contractors and understand who our 'direct care workers' are. Thank you for giving us an opportunity to voice our opinion.

On June 10, Wesley Community Services said the following:

> I don't see any problems with the changes and there may be benefits to explicitly cover sub-contractors. Wesley doesn't use any sub-contractors for transportation or meals so the proposed changes do not affect us.

On June 10, Home Care by Black Stone said, "Thanks for the info. I don't see any issues/concerns with the potential rules listed below."

On June 11, the Ohio Council for Home Care and Hospice said,

> ...thanks for all your hard work.
>
> Regarding the first section our only comment has to do with minimizing duplication of efforts in assuring that Medicare certified home health agencies are meeting the requirements that they must follow with their subcontractors and Ohio's background check requirements. ODA should accept the oversight provided by ODH in these situations. Let us know if we can articulate better as this was difficult to write in any easy to understand way.
>
> The last item where you ask if we have any other suggestions, at this time we do not. Beth wants to say she appreciates your capturing removing the 'original copy' language.

RESPONSE 1: In June, ODA consulted with ODH. ODH does not regulate many home and community-based long-term care services such as chore services; pest control; services involving installation or central monitoring stations; transportation; or home maintenance, modification, or repair services. These are services that are likely to involve sub-contracting. ODH also does not regulate home-delivered meals, congregate meals, alternative meals, nutrition consultation, nutrition education, nutrition health screening, grocery shopping assistance, *etc.* It is also common for providers of such nutrition services to sub-contract with a licensed dietitian to perform the LD's components of the nutrition services.

Instead, ODH regulates Medicare-certified home health, which would be similar to ODA's personal care service. In those fields, providers may sub-contract with a nurse to perform the nursing supervisor functions or to provide back-up staff. ODH's rule 3701-60-02 of the Administrative Code requires the primary contractor to be responsible for the criminal records checks of the sub-contractor. The changes H.B. 59 made, require the sub-contractor to be a responsible party that completes its own criminal records checks. That should be a regulatory relief for the primary contractor. H.B. 59 also allows the sub-contractor to share the results of the criminal records check with the primary contractor. Aside from language regarding temporary staffing agencies, prior law did not allow for a sub-contractor to share the results of the criminal records check with the primary contractor, which would have "required" primary contractors to conduct their own criminal records checks on the sub-contracted

direct-care positions or to illegally receive the results of the criminal records checks from the sub-contractor.

The definition of "sub-contractor" should place no new burden upon primary contractors. Instead H.B. 59 and the rules designate the immediate employer to be the responsible party that is required to conduct criminal records checks on its employees before the employees fill direct-care positions.

RESPONSE 2: ODA will gladly remove the troublesome "original copy" terminology from the records-retention language in rule 173-9-08 of the Administrative Code.

On June 12, LifeCare Alliance said,

> We reviewed and did not see anything other than what we had previously discussed. Do you agree that nothing else has changed?
>
> As for the financial impact, I had previously forwarded estimated costs of the added background checks [*cf.*, ODA's BIA for the rules that took effect on January 1, 2013].

On June 17,, Valued Relationships, Inc. said the following:

> We looked over the regulations, and I don't see anything that is a problem for us with regards to the language between the two. I think we are one of the more extensive background checking companies as a provider, so that is probably the reason it won't have a big impact on us.

On July 2, Ohio District 5 Area Agency on Aging, Inc. said,

> I apologize for being late in my response to your email of June 7th where you identified amendments in H.B. 59 and the corresponding rule changes. I do have a couple questions/comments.
>
> In regards to the sub-contractor requirements, I agree that a vendor dropping off food or a cement-mixing company pouring cement should not be required to complete BCII checks for our programs if that is all that they do. To expand that, I do not see a Food Preparer's staff as required to complete background checks since they do not fit the definition of direct care staff.
>
> Last month some of our Focal Point Directors were insistent that they would now be exempt from having BCII checks completed for their Transportation drivers. As I see the requirement, it only exempts "urban mass transit drivers". So, specifically who is exempt? Is this different than the folks exempt from(C)(4)(a) in OAC 173-39-02.13, "Any driver for an urban or rural transit system..."? We do have a couple Focal Points that are designated the rural transit system for their county.
>
> You asked about adding clarification on legal service providers to OAC 173-9-02. My request would be that you do add that piece since it was confusing to us prior to the ODA decision.
>
> In OAC 173-9-04 I would suggest that "and employee" not be added to (F)(2) and (F)(2)(a). I feel that after an employee has been with an entity for five years, it should be the responsibility of that entity to cover the criminal records checks as part of doing business. In my mind, [this is] a different situation than not knowing whether the provider will maintain this person after conditionally hiring or not. How will rapback affect this?

I am concerned about the possibility of not requiring a provider to maintain the original/official copy of the criminal records report or certificate of qualification for employment. I realize that it may not happen often, but we have had providers falsify documents, and I see it as being much easier when a copy can be accepted or scanned for later review. I am more skeptical than I used to be!

Thanks for the opportunity to comment.

RESPONSE ODA emailed on July 2, 2013**:**

Thanks! These are great comments.

We will definitely make it clear which transportation drivers are exempt.

We may also add a statement to rule 173-9-02 to say that no exclusion sets a precedent for other possible exclusions. Honestly, the only common reason why some groups are exempted is their effectiveness at lobbying and because the Attorney General's office thought certain groups weren't as crime-prone as others. Supervision, entering homes, driving, never alone,...are not factors on which providers are/aren't subject to the criminal records check laws.

I don't believe we can change the language on fees unless the General Assembly passes legislation to change the Ohio Revised Code.

On October 21, Area Office on Aging of Northwestern Ohio, Inc. emailed the following about ODA's proposed new draft of rule 173-9-05 of the Administrative Code:

Thanks for the opportunity to review the proposed conditional hiring rule. It did clear things up for me and I think it will work well for agencies that conditionally hire employees.

On October 28, Menorah Park emailed the following about the proposed new drafts of rules 173-9-02 and 173-9-04 of the Administrative Code:

Thank you for your help with this matter, your response was very helpful.

I do think the new versions of the rules are much easier to understand and would be very helpful to those of us who are trying to "understand this matter that is not easy to understand!" Once again thank you so much for your help.

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?

In December, 2012, ODA compiled the FAQs and developed a webpage of FAQs for its criminal records check rules. ODA added more FAQs, but not all FAQs to the page throughout 2013. Throughout 2013, ODA used Google Analytics to monitor the traffic on that page, which was far higher than the traffic for any individual criminal records check rule.[4] Google Analytics indicated that the public was relying heavily on the FAQ page to understand the law. This was evidence ODA used to justify rewriting the rules with language that would be less likely to require interpretation.

[4] For details, see the tables that ODA inserted into its response to #1 of this BIA.

As stated in the BIA for the version of the rules that took effect on January 1, these rules have an empirical foundation, particularly rule 173-9-07 of the Administrative Code. As ODA indicated in that BIA:

> ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services referred to the following research when developing the exclusionary periods (*i.e.*, "tiers) in found in proposed new rule 173-9-07 of the Administrative Code and the other three state agencies' corresponding rules:
>
> - Blumstein, A., and K. Nakamura. "Redemption in the Presence of Widespread Criminal Background Checks." Criminology. *Vol.*, 47. © May, 2009. *Pp.*, 327-359. See also, http://www.nij.gov/journals/263/redemption.htm. Blumstein and Nakamura also made a presentation of their research to the Ex-Offender Re-Entry Coalition on September 16, 2010. State staff on this project attended the presentation.
>
> - "Scarlet Letters and Recidivism: Does an Old Crime Predict Future Offending?" Criminology and Public Policy. *Vol.*, 5. © 2006. *Pp.*, 493-522.
>
> - "Enduring Risk: Does an Old Crime Predict Future Offending?" Crime and Delinquency. *Vol.*, 53. © 2007. *Pp.*, 64-83.
>
> - "When Do Ex-Offenders Become Like Non-Offenders?" Howard Journal of Criminal Justice. *Vol.*, 48. © 2009. *Pp.*, 473-487.
>
> - "The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time To Redemption?" Criminology. *Vol.*, 49. © 2011. *Pp.*, 27-60.

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 considered only incorporating the amendments from H.B.59 into this rule project. Certainly, doing so would have made this rule project move forward more quickly. However, the frequency of FAQs convinced ODA to reword the rules for to simplify them to use language that would be difficult to misinterpret.

ODA also considered adding citations to the Ohio Revised Code throughout the chapter that authorize each regulation. Doing so would not add more regulations to the Chapter, but it would have made the chapter more difficult to read. Additionally, the "rule amplifies" section at the end of each rule could suffice for the purpose of citations. Therefore, ODA reversed from its earlier plan to cite the Ohio Revised Code throughout the rules.

ODA also considered eliminating "full-time, part-time, or temporary" from the chapter by cause it covered all durations of employment types and sections 173.27 and 173.38 of the Revised Code contains the information, so nothing would be lost. ODA later decided that removing the language from the corresponding chapter could cause a new FAQ about part-time and temporary employees. Therefore, ODA decided to leave the words in the rules.

Business Impact Analysis

As far as the decisions regarding the implementation of new public policies that regulate or de-regulate, ODA was required to implement the new public policies that H.B.59 enacted into the Ohio Revised Code.

The items from H.B.59 that ODA implemented into Chapter 173-9 of the Administrative Code were the new requirements for (1) sub-contractors, (2) area agencies on aging, and (3) PASSPORT administrative agencies; plus, the new exemptions for (4) assisted-providers and (5) positions that solely involve transporting consumers while working for mass transit systems. Additionally, ODA exempted (6) legal services providers.

H.B.59 required ODA to define “sub-contractor,” which gave ODA flexibility in doing so.

An earlier draft of the definition included several examples of sub-contractors that would fit the definition of “sub-contractor” for the purposes of the chapter and sub-contractors that would not fit the definition of “sub-contractor” for the purposes of the chapter. The definition follows:

> "Sub-contractor" means a party that enters into a contract with a responsible party to provide a component of one or more of the responsible party's direct-care positions. "Sub-contractor" does not include a party that only supplies goods to the responsible party, but does not supply goods to the consumer.
>
> "Sub-contractor" includes the following four examples:
>
> - A self-employed dietitian who performs components of nutrition services for multiple responsible parties.
> - A self-employed carpenter who builds wheelchair ramps for a responsible party that offers home-modification services, but does not have enough home-modification business to hire the carpenter as an employee.
> - A nursing agency that supplies nursing services to multiple responsible parties who do sub-contract for nursing services rather than hire the nurses to be the responsible parties' employees.
> - An agency that performs the installation components for a responsible party's home medical equipment service.
>
> "Sub-contractor" does not include the following three examples:
>
> - A party that supplies goods to the primary responsible party, but not directly to the consumer. This includes a wholesale kitchen that supplies meals to a responsible party that delivers meals. This also includes a lumber yard that supplies wood to a responsible party that offers home-modification services.
> - An employment service that refers applicants to a responsible party for the responsible party to consider hiring.
> - An employment service that refers to a responsible party temporary employees who remain employees of the employment service.

At the insistence of ODA's legal counsel and assistant director, ODA removed the examples because ODA wants the public to have a definition that it could *broadly apply* to many situations. In ODA's experience, citing specific examples in the rules has caused the public to *narrowly apply* a regulation to various situations. For example, a provider who is a sub-contractor might have said, "If ODA meant for *our situation* to define us as a sub-contractor, ODA would have listed our situation with the other examples."

At the time of the public-comment period and submission to the CSIO, ODA had settled on the proposed new definition below:

> "Sub-contractor" means a responsible party that enters into a contract with another responsible party to provide a component of one or more of the other responsible party's direct-care positions. "Sub-contractor" includes a party that directly supplies goods or services to a consumer on behalf of another responsible party. "Sub-contractor" does not include a party that indirectly supplies goods or services to a consumer by directly providing the goods or services to another responsible party.

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.

Sections 173.27 and 173.38 of the Revised Code apply to all responsible parties listed in those sections regardless of their performance. ODA does not have the ability to regulate any provider differently based upon their performance.

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

The General Assembly only gave ODA the authority to implement sections 173.27 and 173.38 of the Revised Code into rules.

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.

Before the rules would take effect, ODA will post them on ODA's website (http://aging.ohio.gov/information/rules/default.aspx). ODA also sends an email to subscribers of our rule-notification service to feature the new rules.

On November 19, ODA spoke at the 33rd Annual Meeting and Exposition of the Ohio Association of Medical Equipment Services (OAMES) to highlight the proposed new rules and to facilitate a question-and-answer session. ODA is likely to offer participate in more such events to highlight the rules to those regulated by the rules.

Business Impact Analysis

On an ongoing basis, ODA works with its designees (area agencies on aging, PASSPORT administrative agencies, and regional long-term care ombudsman offices) to ensure that the regulation is applied uniformly. ODA and its designees offer technical assistance to providers who request help. ODA and its designees also monitor the providers for compliance in accordance with rules 173-3-06, 173-14-24, and 173-39-02 of the Administrative Code.

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;

Proposed amended rule 173-9-01 of the Administrative Code defines "direct-care position" and "ombudsman position." Those positions, and unless they are self-employed, their employers, are the impacted business community.

For the version of these rules that took effect on January 1, 2013, ODA worked with three other state agencies and the Governor's Office of Health Transformation to develop estimates for the statewide total of direct-care positions for Ohio. The state agencies went this route to avoid counting certain direct-care positions multiple times if the position involved serving consumers who are enrolled in various programs that are administered by different state agencies. For example, a person holding a direct-care position in an adult day center may furnish personal care to various consumers, many of whom are enrolled in the PASSPORT Program and Older Americans Act Programs, plus others who are enrolled in the Alzheimer's Respite Program, Choices Program, Developmental Disabilities Program, and Home Care Waiver Program. The estimated number of direct-care positions calculated for that rule filing was 93,910.

ODA believes that, one year later, the estimated number of direct-care positions remains around 93,910.

H.B.59 exempted direct-care positions in assisted-living facilities and in mass transit agencies. However, those positions are still regulated by the statutes that govern criminal records checks for ODM-administered programs, DoDD-administered programs, and ODH. Thus, the exemption does not affect the 93,910 figure.

H.B.59 now explicitly requires area agencies on aging and PASSPORT administrative agencies to conduct criminal records checks. However, these agencies have already been conducting criminal records checks on staff members. They were already counted among the 93,910 positions.

Through H.B.59, the legislature granted the request of a regional transit authority to exempt mass transit providers from section 173.38 of the Administrative Code. However, the same providers are not exempt from any other state agencies' criminal records check requirements. Thus, while ODA will not monitor nor enforce criminal records check laws on such providers, any time a mass transit provider drives a consumer who is enrolled in a program under the Ohio Departments of Developmental Disabilities or

Medicaid[5], the provider shall comply with the criminal records check laws for those departments' programs. Unless mass transit drivers refuse to transport consumers other than those who are enrolled ODA's programs, the drivers will still be subject to the criminal records check laws of other programs and, as a result, would still face the same adverse impact. Therefore, they continue to be part of the 93,910 figure.

Because the total figure of 93,910 counts all ombudsman positions and direct-care positions in Ohio, sub-contractors are also part of that figure. However, because the statute did not explicitly require sub-contractors to review databases and check criminal records before the enactment of H.B.59, and because ODA had no authority to monitor the criminal records of sub-contractors before the enactment of H.B.59, the only possible newly impacted business community would be sub-contractors who did no other business with ODA, DoDD, ODH, or ODM in which they would have been subject to a criminal records check. Hypothetically, it was possible to "fly below the radar" before the enactment of H.B.59. After H.B.59's enactment, it is no longer possible. ODA knows of no such sub-contractors at this time.

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

The direct adverse impacts are the fees. The indirect adverse impacts are the administrative expenses of conducting the checks and the job losses due to criminal records.

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.

FEES
The proposed amendments to Chapter 173-9 of the Administrative Code (through proposed amended and new rules) should not require Ohio businesses to conduct a greater number of criminal records checks than before the effective date of H.B.59 (130th G.A.). Additionally, the fees remain the same as those established before the January 1 rules took effect.

The direct adverse impacts are the $22 fees that each responsible entity (*i.e.*, employer) pays to the Bureau of Criminal Investigation plus the impression costs that go to the fingerprint takers (*e.g.*, license agency, county sheriff's office, city police). For example, the Ohio Attorney General's online WebCheck® locator says that the Cincinnati BMV charges $32 for a criminal records check, which is $22 (for BCI) plus $10 (for the BMV).

[5] The Ohio Department of Health does not regulate transportation services for community-based long-term care services.

Using the Cincinnati BMV's prices, it would cost the direct-care industry in Ohio just over $3-million to conduct a round of criminal records checks on each of the 93,910 direct-care employees in Ohio, which is $2,066,020 (for BCI) plus $939,100 (for the BMV).

Additionally, ODA found from its 2012 survey of a variety of providers that the experience would greatly vary by the type of provider and volume of employees. For example (using the Cincinnati BMV's prices):

- Home Care by Black Stone has 1,256 direct-care employees who provide personal care services. ODA estimates that it would cost Black Stone $40,000 to conduct a round of criminal records checks on each of these employees.

- Wesley Community Services has 97 direct-care employees who provide personal care, transportation, or delivery of home-delivered meals. ODA had estimated that it would cost Wesley $3,104 to conduct a round of criminal records checks on each of these employees. However, now that ODA is proposing in rule 173-9-04 to exempt those who only deliver meals from being checked as current employees, ODA estimates that on 65 direct-care employees require criminal records checks. It would cost Wesley $2,080 to conduct a round of criminal records checks on each of these employees.

The only responsible parties that may feel that the proposed amended and new rules create a new adverse impact are those who believed they were not responsible to comply with the current rules.

ADMINISTRATIVE COSTS

ODA's proposed changes to the chapter do not reduce most of the adverse impact of administrative costs associated with reviewing databases and checking criminal records. The best that ODA is offering the public is to rewrite the rules in a way that does not require interpretation, which, in theory, should reduce the amount of time necessary to comprehend the rules.

ODA is presently working with the Office of Health Transformation and other agencies to develop a new, online system for reviewing databases, checking criminal records, and storing information. We hope to run a pilot on this project in spring of 2014. Thus, a plan to reduce administrative burdens is under development.

JOBLESSNESS

H.B.487 greatly increased the number of disqualifying offenses from 55 to 129. This created a new impact because beginning on January 1, employees with disqualifying criminal records could lose their jobs unless the provider wanted to retain them under the terms of rule 173-9-07 of the Administrative

Code. Rule 173-9-07 of the Administrative Code minimizes the joblessness potential.

H.B.59's amendments to the Revised Code did not further increase the number of disqualifying offenses and should not increase the likelihood of joblessness, except for a hypothetical sub-contractor who may have "flown below the radar" before H.B.59's enactment. Such a sub-contractor could retain their ability to provide services under the terms of rule 173-9-07 of the Administrative Code, which should minimize the joblessness potential of this hypothetical situation.

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

The justification for the rules in general is no different than it was for the January 1 version of the rules. For those rules, ODA stated the following:

> Based upon the Ohio Attorney General's concerns over the safety of vulnerable Ohioans who receive in-home care services, and because H.B.487 implemented the attorney general's concerns, ODA has determined that the intent to ensure safety and comply with our state's laws outweighs the costs. Even so, ODA and the three other state agencies reduced the adverse impact by require less-frequent checks on current employees, by phasing in the checks on current employees, and by eliminating certain low-risk types of direct-care staff from ongoing checks all together.

The justification for the ODA's proposal to reword the entire chapter to use language that doesn't require interpretation is based on ODA's findings in Google Analytics, which ODA outlined in its response to #10 of this BIA.

Regulatory Flexibility

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

Sections 173.27 and 173.38 of the Revised Code do not allow for alternative means to comply with the statutes. For example, for the purposes of those sections, a provider may not use criminal records obtained from a private company in lieu of the reports obtained from the Bureau of Criminal Investigation. The rules reflect this as well.

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. That general statute does not override the specific criminal records requirements in sections 173.27 and 173.38 of the Revised Code. Therefore, not obtaining a criminal records report is not a paperwork violation. Hiring a person with a disqualifying offense is not a paperwork violation. Furthermore, section 173.391 of the Revised Code states that ODA may enact disciplinary measures upon a provider who violates section 173.38 of the Revised Code and makes no mention of a first-time paperwork violation.

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

The staff at area agencies on aging (AAAs), PASSPORT administrative agencies (PAAs), and ODA are available to help direct-care providers of any size with their questions about the statutes and rules. Direct-care providers may address their questions to the AAAs, PAAs, or ODA, including ODA's regulatory ombudsman.

Additionally, the Ohio Attorney General's Bureau of Criminal Investigation can assist providers of ombudsman services and direct-care providers of any size with questions about obtaining and reading criminal records on their applicants and employees.

H.B.59 replaced "173.394" with "173.38."

*** DRAFT - NOT YET FILED ***

173-9-01 **Introduction and definitions.**

(A) Introduction: Chapter 173-9 of the Administrative Code implements sections 173.27 and 173.38 of the Revised Code which require responsible parties to review databases and check criminal records when hiring an applicant for, or retaining an employee in, a paid ombudsman position or paid direct-care position.

(B) Definitions for Chapter 173-9 of the Administrative Code:

In response to FAQs about the volunteer exemption, ODA added "paid" throughout the rules, and simplified the exemption language in this rule and in rule 173-9-02.

(1) "Area agency on aging" has the same meaning as in section 173.14 of the Revised Code.

(2) "Applicant":

(a) For an ombudsman position, "applicant" means a person that a responsible party is giving final consideration for hiring into a paid ombudsman position that is full-time, part-time, or temporary, including the position of state long-term care ombudsman or regional director. "Applicant" does not include a volunteer.

(b) For a direct-care position, "applicant" means a person that a responsible party is giving final consideration for hiring into a paid direct-care position that is full-time, part-time, or temporary, even if an employment service refers the person to the responsible party. "Applicant" includes a person that a consumer has under final consideration for hiring as a consumer-directed or self-directed provider. "Applicant" means the self-employed person if the person is applying to become an ODA-certified non-agency or independent provider under Chapter 173-39 of the Administrative Code or if the person is bidding to win a provider agreement under Chapter 173-3 or 173-4 of the Administrative Code. "Employee" does not include a volunteer.

(3) "BCII" means "the bureau of criminal identification and investigation" and includes the superintendent of BCII.

New terms allow ODA to use simpler phrasing in the rules.

(4) "Check criminal records" means to conduct a criminal records check.

(5) "Community-based long-term care services" means community-based long-term care services that are provided under any ODA-administered program.

(6) "Consumer" means a person who receives community-based long-term care services.

(7) "Criminal records" has the same meaning as "results of the criminal records check," "results," and "report" in sections 173.27 and 173.38 of the Revised Code when those sections use "results of the criminal records check," "results," and "report" to refer to the criminal records that BCII provides to

responsible parties that conduct criminal records checks. Criminal records originate from BCII unless the context indicates that the criminal records originate from the FBI.

New terms allow ODA to use simpler phrasing in the rules.

(8) "Criminal records check" ("check") the criminal records check described in section 109.572 of the Revised Code when a responsible party conducts the check to comply with sections 173.27 and 173.38 of the Revised Code and Chapter 173-9 of the Administrative Code.

(9) "Database reviews" means the database reviews that rule 173-9-03 of the Administrative Code requires.

New from H.B.59: "Direct-care *position*" not "Direct care"

(10) "Direct-care position":

(a) "Direct-care position" means an employment position in which an employee has either one or both of the following:

(i) In-person contact with one or more consumers.

(ii) Access to one or more consumers' personal property or records.

New exemption from H.B.59

(b) "Direct-care position" does not include a position that solely involves transporting people while working for a county transit system, regional transit authority, or regional transit commission.

(11) "Disqualifying offense" means any offense listed or described in divisions (A)(3)(a) to (A)(3)(e) of section 109.572 of the Revised Code.

(12) "Employee":

(a) For an ombudsman position, "employee" means a person that a responsible party hired into a paid ombudsman position that is full-time, part-time, or temporary, including the position of the state long-term care ombudsman or regional director. "Employee" does not include a volunteer.

(b) For a direct-care position, "employee" means a person that a responsible party hired into a paid direct-care position that is full-time, part-time, or temporary, even if an employment service initially referred the person to the responsible party. "Employee" includes a consumer-directed provider and a self-directed provider. "Employee" means the self-employed person if the person is an ODA-certified non-agency or independent provider under Chapter 173-39 of the Administrative Code or if the person is party to a provider agreement under Chapter 173-3 or 173-4 of the Administrative Code. "Employee" does not include a volunteer.

In response to 2 FAQs--one on conditional hiring, and another on the applicability of the chapter to 3 positions that don't require checks as employees, ODA is replacing "employ or continue to employ," "employment," "terminate," *etc.* with "hire," "retain," "fire," and "release."

(13) "FBI" means "federal bureau of investigation."

(14) "Fire" has the same meaning as "terminate" in sections 173.27 and 173.38 of the Revised Code when the "terminate" regards firing an employee.

(15) "Hire" has the same meaning as "employ" in sections 173.27 and 173.38 of the Revised Code when "employ" regards hiring an applicant.

(16) "Minor drug possession offense" has the same meaning as in section 2925.01 of the Revised Code.

(17) "ODA" means "the Ohio department of aging."

New terms allow ODA to use simpler phrasing in the rules.

(18) "Ombudsman position" means a position that involves providing ombudsman services to residents and recipients, as defined in section 173.14 of the Revised Code. "Ombudsman position" includes the state long-term care ombudsman and representatives of the office of the state long-term care ombudsman.

(19) "PASSPORT administrative agency" has the same meaning as in section 173.42 of the Revised Code.

(20) "Provider" means a person or government entity that provides community-based long-term care services under an ODA-administered program.

(21) "Release" has the same meaning as "terminate" in sections 173.27 and 173.38 of the Revised Code when "terminate" regards releasing a conditionally-hired applicant.

(22) "Request criminal records" means to request a criminal records check, unless the context indicates that the request is of criminal records from the FBI.

(23) "Responsible party":

New term from H.B.59

(a) When hiring an applicant for, or retaining an employee in, a paid ombudsman position as the state long-term care ombudsman, "responsible party" means ODA's director.

(b) When hiring an applicant for, or retaining an employee in, a paid ombudsman position in the office of the state long-term care ombudsman, "responsible party" means the state long-term care ombudsman.

(c) When hiring an applicant for, or retaining an employee in, a paid ombudsman position as the director of a regional program, "responsible

party" means the regional program.

(d) When hiring an applicant for, or retaining an employee in, a paid ombudsman position in the regional program, "responsible party" means the regional program.

(e) When hiring an applicant for, or retaining an employee in, a paid direct-care position, "responsible party" means the area agency on aging, PASSPORT administrative agency, provider, or sub-contractor.

(f) When hiring an applicant for, or retaining an employee in, a paid direct-care position in a consumer-direction or self-direction arrangement, "responsible party" means the consumer.

(g) When considering a self-employed applicant for ODA-certification under Chapter 173-39 of the Administrative Code, a self-employed person already ODA-certified under Chapter 173-39 of the Administrative Code, a self-employed bidder for a provider agreement under Chapter 173-3 or 173-4 of the Administrative Code, a self-employed person already in a provider agreement under Chapter 173-3 or 173-4 of the Administrative Code, a self-employed sub-contractor entering into a contract with another responsible party, or a self-employed sub-contractor already in a contract with another responsible party, "responsible party" means the self-employed business owner.

(24) "Retain" has the same meaning as "continue to employ" in sections 173.27 and 173.38 of the Revised Code.

(25) "Reviewing databases" means the action involved in database reviews.

(26) "Self-employed" means the state of working for one's self with no employees. Non-agency and independent providers are self-employed. Consumer-directed providers are not self-employed because the consumer is the employer of record.

(27) "Sub-contractor" means a responsible party that enters into a contract with another responsible party to provide a component of one or more of the other responsible party's direct-care positions. "Sub-contractor" includes a party that directly supplies goods or services to a consumer on behalf of another responsible party. "Sub-contractor" does not include a party that indirectly supplies goods or services to a consumer by directly providing the goods or services to another responsible party.

(28) "Volunteer" means a person who serves in an ombudsman position or a direct-care position without receiving, or expecting to receive, any form of remuneration other than reimbursement for actual expenses.

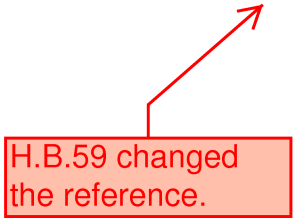
New from H.B.59: AAAs, PAAs, and sub-contractors are responsible parties.

See earlier comment for "fire."

New terms allow ODA to use simpler phrasing in the rules.

H.B.59 required ODA to define this term. ODA did so by exempting sub-contractors who only supply goods and services directly to another responsible party (*e.g.*, wholesale kitchen, cement company, office supplies)

(29) "Waiver agency" has the same meaning as in section 5164.342 of the Revised Code.



In response to FAQs, ODA (1) simplified this rule, (2) organized 3 paragraphs under the sub-headings "applicability," "limited applicability," and "inapplicability," and (3) moved the "limited applicability" language from rule 173-9-04 to this rule, (4) added "paid" and simplified the volunteer exemption, and (5) added "(pre-hire)" and "(post-hire)".

173-9-02 **Applicability.**

(A) Applicability: Chapter 173-9 of the Administrative Code (the chapter) applies to every paid ombudsman position and every paid direct-care position unless this rule states otherwise. (ODA defined "ombudsman position" and "direct-care position" in rule 173-9-01 of the Administrative Code.)

(B) Limited applicability: Although the chapter applies to any a person who is an applicant (pre-hire) for a paid direct-care position, a person who is an employee in one of the following paid direct-care positions is not required to undergo subsequent (post-hire) database reviews and criminal records checks:

(1) A direct-care position that only delivers home-delivered meals.

(2) A direct-care position that only has access to one or more consumers' personal records (e.g., a position in an office, kitchen, or central monitoring station).

(3) A direct-care position that only provides a one-time chore service, home maintenance, home modification, home repair, or pest control. If the person provides a subsequent episode of service to the same consumer or to another consumer who is enrolled in an ODA-administered program, the person shall undergo subsequent (post-hire) database reviews and criminal records checks.

(C) Inapplicability: The chapter does not apply to the following positions:

(1) A volunteer position.

(2) A position that solely involves transporting consumers while working for a county transit system, regional transit authority, or regional transit commission.

(3) A position that involves providing legal services.

(4) A position in a residential care facility.

(5) A position providing medicare-certified home health services.

(6) A position that only serves consumers who are enrolled in an ODM-administered medicaid waiver program.

Another new exemption

New exemptions from H.B.59

(D) No implied factors: Whether a position is supervised or unsupervised, alone or never alone, enters a home or never enters a home, regulated elsewhere or not regulated elsewhere is not a factor that determines if the chapter applies to the position.

This paragraph allows ODA to use simple language in other rules.

(E) Chief administrators: Requirements in the chapter for responsible parties of area agencies on aging, PASSPORT administrative agencies, agency providers, and agency sub-contractors to request, review, or retain criminal records are requirements of each responsible party's chief administrator or any person that the

This paragraph is in response to FAQs that want to know if the exemptions under paragraph (C) establish an unwritten basis by which we may determine that others could be exempted.

chief administrator designates for these tasks.

In response to FAQs, ODA (1) highlighted the database URLs by moving them to a table at the beginning of the rule, (2) explain the requirements to review databases *before every* criminal records check, and (3) added a table to match that for criminal records checks in rule 173-9-04.

173-9-03 **Reviewing databases (for all responsible parties except the self-employed).**

To keep the rule simple, ODA moved language that is just for the self-employed to rule 173-9-03.1

(A) Databases to review: Any time this rule requires a responsible party to review an applicant's (pre-hire) or employee's (post-hire) status in databases, the responsible party shall review the following six databases:

DATABASES TO REVIEW

SAM	https://www.sam.gov/
OIG	http://exclusions.oig.hhs.gov/
Abuser Registry	https://its.prodapps.dodd.ohio.gov/ABR_Default.aspx
Sex-Offender Search	http://www.icrimewatch.net/index.php?AgencyID=55149&disc=
Offender Search	http://www.drc.ohio.gov/OffenderSearch/Search.aspx
Nurse-Aide Registry	https://odhgateway.odh.ohio.gov/nar/nar_registry_search.aspx

(1) The United States general services administration's system for award management.

(2) The office of inspector general of the United States department of health and human services' list of excluded individuals.

(3) The department of developmental disabilities' online abuser registry that lists people cited for abuse, neglect, or misappropriation.

(4) The Ohio attorney general's sex offender and child-victim offender database.

(5) The department of rehabilitation and correction's database of inmates.

(6) The department of health's state nurse aide registry. If the applicant or employee does not present proof that he or she has been a resident of Ohio for the five-year period immediately preceding the date of the database review, the responsible party shall conduct a database review of the nurse aide registry in the state or states in which the applicant or employee lived.

(B) When to review databases:

WHEN TO REVIEW DATABASES

POSITIONS	APPLICANTS (PRE-HIRE)	EMPLOYEES

		(POST-HIRE)
Ombudsman position	Required	Required
Direct-care position: Only delivers meals	Required	Not required
Direct-care position: Only has access to consumers' personal records	Required	Not required
Direct-care position: Only provides a specified once-ever service	Required	Not required
Transportation position: If applying for, or employed by, a county transit system, regional transit authority, or regional transit commission	Not required	Not required
Transportation position: If applying for, or employed by, a provider other than a county transit system, regional transit authority, or regional transit commission, the position is a direct-care position	Required	Required
All direct-care positions not listed above	Required	Required

Because the rule doesn't prohibit, but allows post-hire checks for certain direct-care positions, ODA replaced "Yes" and "No" with "Required" and "Not required."

New exemption from H.B.59

(1) Applicants (pre-hire): The responsible party shall review each applicant's (pre-hire) status in the databases before conducting the criminal records check that rule 173-9-04 of the Administrative Code requires for applicants.

(2) Employees (post-hire): The responsible party shall review each employee's (post-hire) status in the databases before conducting the criminal records check that rule 173-9-04 of the Administrative Code requires for employees. Because rule 173-9-02 of the Administrative Code does not require criminal records checks on employees (post-hire) in three types of direct-care positions, the responsible party is not required to review databases on employees (post-hire) in the same three types of direct-care positions.

(C) Disqualifying status:

(1) No responsible party shall hire an applicant or retain an employee if the applicant's or employee's status in the databases reveals the following:

(a) One or more of the databases in paragraphs (A)(1) to (A)(5) of this rule lists the applicant or employee.

(b) The database in paragraph (A)(6) of this rule lists the applicant or employee as a person who neglected or abused a long-term care facility resident or residential care facility resident or misappropriated such a resident's property.

(2) If the responsible party's database reviews reveal that the applicant or employee is disqualified, the responsible party shall inform the applicant or employee of the disqualifying information.

(D) Referrals from employment services: A responsible party is not required to review the databases if the applicant or employee of a direct-care position was referred to the responsible party by an employment service that refers applicants to responsible parties to fill full-time, part-time, or temporary direct-care positions if the responsible party obtains copies of records from the employment service that verify that the applicant's or employee's status in the databases does not disqualify him or her.

173-9-03.1 **Reviewing databases (for the self-employed).**

(A) Databases to review: Any time this rule requires a self-employed responsible party to review his or her status in databases, the responsible party shall review the following six databases:

DATABASES TO REVIEW

SAM	https://www.sam.gov/
OIG	http://exclusions.oig.hhs.gov/
Abuser Registry	https://its.prodapps.dodd.ohio.gov/ABR_Default.aspx
Sex-Offender Search	http://www.icrimewatch.net/index.php?AgencyID=55149&disc=
Offender Search	http://www.drc.ohio.gov/OffenderSearch/Search.aspx
Nurse-Aide Registry	https://odhgateway.odh.ohio.gov/nar/nar_registry_search.aspx

(1) The United States general services administration's system for award management.

(2) The office of inspector general of the United States department of health and human services' list of excluded individuals.

(3) The department of developmental disabilities' online abuser registry that lists people cited for abuse, neglect, or misappropriation.

(4) The Ohio attorney general's sex offender and child-victim offender database.

(5) The department of rehabilitation and correction's database of inmates.

(6) The department of health's state nurse aide registry. If the applicant or employee does not present proof that he or she has been a resident of Ohio for the five-year period immediately preceding the date of the database review, the responsible party shall conduct a database review of the nurse aide registry in the state or states in which the applicant or employee lived.

(B) When to review databases:

WHEN TO REVIEW DATABASES

POSITIONS	BEFORE APPLYING TO BECOME	AFTER BECOMING ODA-CERTIFIED OR

	ODA-CERTIFIED OR BEFORE BIDDING FOR A PROVIDER AGREEMENT OR SUB-CONTRACT	AFTER ENTERING INTO A PROVIDER AGREEMENT OR SUB-CONTRACT
Direct-care position: Only delivers meals (as sub-contractor)	Required	Not required
Direct-care position: Only has access to consumers' personal records (as sub-contractor)	Required	Not required
Direct-care position: Only provides a specified once-ever service	Required	Not required
Transportation position: If applying for, or employed by, a county transit system, regional transit authority, or regional transit commission	Not required	Not required
Transportation position: If applying for, or employed by, a provider other than a county transit system, regional transit authority, or regional transit commission, the position is a direct-care position	Required	Required
All direct-care positions not listed above	Required	Required

(1) Before applying to become ODA-certified, or before bidding for a provider agreement or sub-contract, the responsible party shall review his or her status in the databases before checking his or her criminal records.

(2) After becoming ODA-certified, or after entering into a provider agreement or sub-contract, the responsible party shall review his or her status in the databases before each time that the responsible party conducts a criminal records check according to one of the schedules in rule 173-9-04.1 of the Administrative Code. If the responsible party provides services equivalent to one of the direct-care positions under paragraph (B) of rule 173-9-02 of the

Administrative Code, the responsible party is not required to conduct subsequent database reviews and criminal records checks after becoming ODA-certified or after entering into a provider agreement or sub-contract.

(C) Disqualifying status: No responsible party shall provide a direct-care service if his or her status in the databases reveals the following:

(1) One or more of the databases in paragraphs (A)(1) to (A)(5) of this rule lists the responsible party.

(2) The database in paragraph (A)(6) of this rule lists the responsible party as a person who neglected or abused a long-term care facility resident or residential care facility resident or misappropriated such a resident's property.

*** DRAF

In response to FAQs, ODA (1) moved the language for self-employed providers to rule 173-9-04.1, (2) added a second table that highlights the start dates and deadlines for checking criminal records, (3) moved language to rule 173-9-02.

173-9-04 **When to check criminal records, inform applicants, charge fees, and use forms (for all responsible parties except the self-employed).**

(A) Database reviews first: The responsible party shall conduct database reviews on each applicant (re-hire) and each employee (post-hire) before conducting a criminal records check. If the database reviews disqualify the applicant or employee, the responsible party shall not conduct a criminal records check. If the database reviews did not disqualify the applicant or employee, the responsible party shall conduct a criminal records check.

(B) When to check criminal records:

WHEN TO CHECK CRIMINAL RECORDS

POSITION	CHECK WHEN APPLICANTS (PRE-HIRE)	CHECK WHEN EMPLOYEES (POST-HIRE)
Ombudsman position	Required	Required
Direct-care position: Only delivers meals	Required	Not required
Direct-care position: Only has access to consumers' personal records	Required	Not required
Direct-care position: Only provides a specified once-ever service	Required	Not required
Transportation position with a county transit system, regional transit authority, or regional transit commission.	Not required	Not required
Transportation position other than a position with a county transit system, regional transit authority, or regional transit commission	Required	Required
All direct-care positions not listed above	Required	Required

START DATES & DEADLINES FOR CHECKING CRIMINAL RECORDS

	START DATE	FIRST DEADLINE AFTER JANUARY 1, 2013	SUBSEQUENT DEADLINES
Applicants (pre-hire)	When applicant is under final consideration for paid employment,	Fingerprinting before hiring the applicant and before the end of the	Not applicable. (See rows for employees.)

	but only if the database reviews don't disqualify the applicant	sixty-day period of conditional hiring (if the responsible party utilized the conditional-hiring option in rule 173-9-05 of the Administrative Code)	
Employees (post-hire): Five-year schedule for pre-2008 hire dates	Any time, but only if the database reviews don't disqualify the employee	2013 hiring anniversary + 30 days	Every 5th-year hiring anniversary + 30 days
Employees (post-hire): Five-year schedule for 2008-present hire dates	Any time, but only if the database reviews don't disqualify the employee	First 5th-year hiring anniversary + 30 days	Every 5th-year hiring anniversary + 30 days
Employees (post-hire): Less-than five-year schedule	Any time, but only if the database reviews don't disqualify the employee	No deadline, so long as more frequent than every 5 years	No deadline, so long as more frequent than every 5 years

(1) Applicants (pre-hire):

(a) Ombudsman position: The responsible party shall conduct a criminal records check on each applicant.

(b) Direct-care position: The responsible party shall conduct a criminal records check on each applicant. The responsible party shall do so even if paragraph (B) of rule 173-9-02 of the Administrative Code would not require the responsible party to check the person again after the responsible party hired the applicant.

(2) Employees (post-hire):

(a) Ombudsman position: According to one of the following three schedules, the responsible party shall conduct a criminal records check on each employee at least once every five years:

(i) Five-year schedule for pre-2008 hire dates: If the responsible party hired the employee before January 1, 2008, the responsible party shall conduct a criminal records check on the employee no later

than thirty days after the 2013 anniversary of the employee's date of hire and no later than thirty days after each five-year anniversary after 2013. A responsible party that follows this schedule is not required to wait until the employee's anniversary to conduct a criminal records check. The responsible party has five years, plus thirty days, to conduct the next check.

(ii) Five-year schedule for 2008-present hire dates: If the responsible party hired the employee on or after January 1, 2008, the responsible party shall conduct a criminal records check on the employee no later than thirty days after the fifth anniversary of the employee's date of hire and no later than thirty days after each five-year anniversary. A responsible party that follows this schedule is not required to wait until the employee's five-year anniversary to conduct a criminal records check. The responsible party has five years, plus thirty days, to conduct the next check.

(iii) Less-than-five-year schedule: The responsible party may conduct criminal records checks on an employee more frequently than every five years. If the responsible party checks more frequently than every five years, the responsible party is not required to conduct criminal records checks according to the five-year schedules.

(b) Direct-care position: According to one of the following three schedules, the responsible party shall conduct a post-hire criminal records check on each employee at least once every five years, unless the employee's direct-care position is listed under paragraph (B) of rule 173-9-02 of the Administrative Code:

(i) Five-year schedule for pre-2008 hire dates: If the responsible party hired the employee before January 1, 2008, the responsible party shall conduct a criminal records check on the employee no later than thirty days after the 2013 anniversary of the employee's date of hire and no later than thirty days after each five-year anniversary. A responsible party that follows this schedule is not required to wait until the employee's anniversary to conduct a criminal records check. The responsible party has five years, plus thirty days, to conduct the next check.

(ii) Five-year schedule for 2008-present hire dates: If the responsible party hired the employee on or after January 1, 2008, the responsible party shall conduct a criminal records check on the employee no later than thirty days after the fifth anniversary of the employee's date of hire and no later than thirty days after each five-year anniversary. A responsible party that follows this

schedule is not required to wait until the employee's five-year anniversary to conduct a criminal records check. The responsible party has five years, plus thirty days, to conduct the next check.

(iii) Less-than-five-year schedule: The responsible party may conduct criminal records checks on an employee more frequently than every five years. If the responsible party checks more frequently than every five years, the responsible party is not required to conduct criminal records checks according to the five-year schedules.

(3) Reverification: If any person has requested a criminal records check on an applicant or employee in the past year, the responsible party may request a reverification of the criminal record from BCII. The reverification of the criminal record has the same validity as the criminal records obtained during the past year.

(C) When to check the FBI's criminal records:

(1) Residency: If an applicant or employee does not provide the responsible party with evidence that he or she has been a resident of Ohio for the five-year period immediately preceding the date the responsible party must request a criminal records check, or if the applicant or employee does not provide the responsible party with evidence that BCII has requested his or her criminal records from the FBI within the five-year period immediately preceding the date the responsible party requests the criminal records check, the responsible party shall request that BCII obtain criminal records from the FBI as part of the criminal records check.

(2) Will of the responsible party: If an applicant or employee provides the responsible party with evidence that he or she has been a resident of Ohio for the five-year period immediately preceding the date the responsible party requests the criminal records check, the responsible party may request that BCII obtain criminal records from the FBI as part of the criminal records check.

(D) Inform applicant: When an applicant initially applies for a paid ombudsman position or a paid direct-care position (or when an employment service initially refers an applicant to a responsible party), the responsible party shall inform the applicant of the following:

(1) If the responsible party gives the applicant final consideration for hiring into the position, the following shall happen:

(a) The responsible party shall review the applicant's status in the databases listed in rule 173-9-03 of the Administrative Code.

(b) Unless the database reviews reveal that the responsible party shall not hire the applicant, the responsible party shall conduct a criminal records check and the applicant shall provide a set of his or her fingerprint impressions as part of the the criminal records check.

(2) If the responsible party hires the applicant, as a condition to retain the position, the responsible party shall conduct post-hire database reviews and criminal records checks according to one of the three schedules listed under paragraph (B)(2) of this rule.

(3) If the responsible party intends to charge the applicant fees for checking criminal records, the responsible party shall inform the applicant of the fees that divisions (C)(2) and (C)(3) of section 109.572 of the Revised Code authorize for checking criminal records.

(E) Investigation fees:

(1) The responsible party shall pay BCII the fees that divisions (C)(2) and (C)(3) of section 109.572 of the Revised Code authorize for each criminal records check.

(2) The responsible party may charge the applicant a fee for checking criminal records so long as the fee does not exceed the amount the responsible party pays to BCII, but only if both of the following apply:

(a) At the time of initial application, the responsible party informed the applicant of the fee's amount and that the responsible party would not hire the applicant if the applicant did not pay the fee.

(b) The medicaid program does not pay the responsible party for the fee it pays to BCII.

(F) Forms: Unless the applicant or employee follows the procedures that BCII established in rule 109:5-1-01 of the Administrative Code for providing fingerprint impressions electronically and requesting criminal records electronically, the responsible party shall complete the following two tasks:

(1) The responsible party shall provide each applicant or employee with the form(s) that BCII requires in division (C)(1) of section 109.572 of the Revised Code.

(2) The responsible party shall obtain the completed fingerprints and forms, then forward them to BCII for processing.

(G) Referrals from employment services: A responsible party is not required to request a criminal records check on an applicant or employee that an employment service refers to the responsible party to fill a full-time, part-time, or temporary direct-care

position if the employment service satisfies one of the two following criteria:

(1) The responsible party obtains copies of records from the employment service that verify the following two items:

(a) The employment service reviewed databases and the applicant's or employee's status in the databases and the status did not did not disqualify him or her.

(b) The employment service obtained the applicant's criminal record less than a year before the employment service referred the applicant or employee to the responsible party and the applicant's criminal record did not list a disqualifying offense.

(2) The responsible party conditionally hires a referred applicant according to the requirements for conditionally hiring referred applicants in rule 173-9-05 of the Administrative Code.

173-9-04.1 **When to check criminal records, pay fees, and use forms (for the self-employed).**

(A) Database reviews first: The responsible party shall review databases on himself or herself before checking his or her criminal records. If the database reviews disqualify the responsible party, the responsible party shall not conduct a criminal records check. If the database reviews did not disqualify the responsible party, the responsible party shall conduct a criminal records check.

(B) When to check criminal records:

WHEN TO CHECK CRIMINAL RECORDS

POSITION	CHECK BEFORE APPLYING TO BECOME AN ODA-CERTIFIED PROVIDER OR BEFORE BIDDING FOR A PROVIDER AGREEMENT OR SUB-CONTRACT	CHECK AFTER BECOMING AN ODA-CERTIFIED PROVIDER OR AFTER ENTERING INTO A PROVIDER AGREEMENT OR SUB-CONTRACT
Ombudsman position	Required	Required
Direct-care position: Only delivers meals	Required	Not required
Direct-care position: Only has access to consumers' personal records	Required	Not required
Direct-care position: Only provides a specified once-ever service	Required	Not required
Transportation position with a county transit system, regional transit authority, or regional transit commission	Not required	Not required
Transportation position other than a position with a county transit system, regional transit authority, or regional transit commission, the position is a direct-care position	Required	Required
All direct-care positions not listed above	Required	Required

START DATES & DEADLINES FOR CHECKING CRIMINAL RECORDS

	START DATE	FIRST DEADLINE AFTER JANUARY 1, 2013	SUBSEQUENT DEADLINES
Before the responsible party applied to become an ODA-certified provider or before the responsible party bid for a provider agreement or sub-contract	Before the responsible party applied to become an ODA-certified provider or before the responsible party bid for a provider agreement or sub-contract	Fingerprinting before ODA certifies the responsible party, before an AAA enters into a provider agreement, before another responsible party enters into a sub-contract, and before the end of the sixty-day period of conditional status (if the responsible party utilized the conditional-status option in rule 173-9-05.1 of the Administrative Code)	Not applicable. (See rows below.)
Five-year schedule if the responsible party became an ODA-certified provider or entered into a provider agreement or sub-contract before 2008	Any time, but only if the database reviews don't disqualify the responsible party	2013 anniversary of certification, agreement, or sub-contract + 30 days	Every 5th-year anniversary of certification, agreement, or sub-contract + 30 days
Five-year schedule if the responsible party became an ODA-certified provider or entered into a provider agreement or sub-contract in 2008 or a later date	Any time, but only if the database reviews don't disqualify the responsible party	First 5th-year anniversary of certification, agreement, or sub-contract + 30 days	Every 5th-year anniversary of certification, agreement, or sub-contract + 30 days
Less-than five-year	Any time, but only if	No deadline, so long	No deadline, so long

schedule	the database reviews don't disqualify the responsible party	as more frequent than every 5 years	as more frequent than every 5 years

(1) Before applying to become ODA-certified, or before bidding for a provider agreement or sub-contract, the responsible party shall check his or her criminal records.

(2) After becoming ODA-certified, or after entering into a provider agreement or sub-contract, the responsible party shall check his or her criminal records at least once every five years, unless the responsible party's direct-care position is listed under paragraph (B) of rule 173-9-02 of the Administrative Code:

(a) Five-year schedule (pre-2008): If the responsible party became ODA-certified provider or entered into a provider agreement with ODA (or an area agency on aging) before January 1, 2008, the responsible party shall conduct a criminal records check on itself no later than thirty days after the 2013 anniversary of its certification, provider agreement, or sub-contract and no later than thirty days after each anniversary every five years after 2013. If the responsible party serves consumers both as an ODA-certified provider and through a provider agreement, the anniversary date is the anniversary of whichever occurred first: the certification or the agreement. A responsible party that follows this schedule is not required to wait until its anniversary to conduct a criminal records check.

(b) Five-year schedule (2008-present): If the responsible party became an ODA-certified provider or entered into a provider agreement with ODA (or an area agency on aging) on or after January 1, 2008, the responsible party shall conduct a criminal records check on itself no later than thirty days after the fifth anniversary of its certification or provider agreement and no later than thirty days after each five-year anniversary. If the responsible party serves consumers both as an ODA-certified provider and through a provider agreement, the anniversary date is the anniversary of whichever occurred first: the certification or the agreement. A responsible party that follows this schedule is not required to wait until its five-year anniversary to conduct a criminal records check.

(c) Less-than-five-year schedule: The responsible party may conduct criminal records checks on itself more frequently than every five years. If the responsible party checks more frequently than every five years, the responsible party is not responsible for conducting criminal records checks according to the five-year schedules.

(3) Reverification: If a responsible party has obtained criminal records on himself or herself during the past year, the responsible party may request a reverification of the criminal record from BCII. The reverification of the criminal record has the same validity as the criminal records obtained during the past year.

(C) When to check the FBI's criminal records: If a responsible party has not been a resident of Ohio for the five-year period immediately preceding the date the responsible party must check criminal records, the responsible party shall request that BCII also obtain the FBI's criminal records.

(D) Investigation fees: The responsible party shall pay BCII the fees that divisions (C)(2) and (C)(3) of section 109.572 of the Revised Code authorize for each criminal records check.

(E) Forms: Unless the procedures that BCII established in rule 109:5-1-01 of the Administrative Code for providing fingerprint impressions electronically and requesting criminal records electronically, the responsible party shall complete the following two tasks:

(1) The responsible party shall use the form(s) that BCII requires in division (C)(1) of section 109.572 of the Revised Code.

(2) The responsible party shall forward the completed fingerprints and forms to BCII for processing.

Addresses FAQ

In response to FAQs about a conditional status for employees (*vs.*, applicants) while waiting for the criminal records, ODA proposes to (1) entitle the rule "conditional hiring," not "conditional employment," (2) add an applicability paragraph, and (3) uses the new "hire" and "release" terms in rule 173-9-01 in this rule and the rest of the chapter as well as the term "post-hire."

173-9-05 **Conditional hiring.**

(A) Applicability: This rule only applies to the conditional hiring of applicants. The rule does not require a conditional status for employees while undergoing post-hire criminal records checks.

(B) Sixty-day period (no referral): A responsible party may conditionally hire an applicant that an employment service did not refer to the responsible party for up to sixty days before the responsible party obtains the applicant's criminal records only if the all of the following three items occur:

(1) The responsible party conducted database reviews and the applicant's status in the databases did not disqualify him or her.

(2) The applicant provides the responsible party with fingerprint impressions before the responsible party conditionally hires the applicant.

(3) The responsible party requests a criminal records check no later than five business days after the responsible party conditionally hires the applicant.

(C) Sixty-day period (referral):

(1) Forward letter to responsible party: A responsible party may conditionally hire an applicant that an employment service refers to the responsible party for up to sixty days, but only if the employment service (or the applicant) forwards a letter to the responsible party that the employment service printed on its letterhead, that a designated official of the employment service dated and signed, and that verifies the following five items:

(a) The employment service conducted database reviews and the applicant's status in the databases and the status did not disqualify him or her.

(b) The employment service requested the applicant's criminal record from BCII.

(c) The requested criminal records check is to include a determination of whether the applicant has been convicted of, or pleaded guilty to, a disqualifying offense.

(d) The employment services has not, as of the date of the letter, received the applicant's criminal record from BCII.

(e) The employment service will promptly forward a copy of the criminal record to the responsible party when the employment service obtains it.

(2) Forward criminal records to responsible party: If a responsible party conditionally hires an applicant that an employment service referred to the responsible party, the employment service shall promptly forward the

Because the way to handle conditional hiring is different when an employment service refers the applicant, ODA separated the regulation into paragraphs (B) and (C).

criminal records to the responsible party when the employment service obtains the criminal records.

(D) Three reasons to release an applicant:

(1) Sixty-day period ends:

(a) Only BCII required: The responsible party shall release the conditionally-hired applicant if more than sixty days passed since the day the responsible party requested a criminal records and the responsible party has not yet obtained the criminal records.

(b) BCII and FBI required: The responsible party is not required to release the conditionally-hired applicant if more than sixty days passed since the responsible party requested criminal records from the FBI and the responsible party has not yet obtained the FBI's criminal records, but only if section 173.27 or 173.38 of the Revised Code required the responsible party to request criminal records from the FBI, and one of the following two conditions exist:

This information was true before H.B.59 but did not appear in the rule. After receiving question about FBI checks taking longer than 60 days, ODA decided to add the language to the rule.

(i) The responsible party obtained criminal records from BCII before the sixty-day period ended and the criminal records from BCII did not list a disqualifying offense.

(ii) The responsible party obtained criminal records from BCII before the sixty-day period ended and the criminal records from BCII listed a disqualifying offense, but the terms of rule 173-9-07 of the Administrative Code would allow the responsible party to hire the applicant, and the responsible party would be willing to hire the applicant under the terms of rule 173-9-07 of the Administrative Code if the forthcoming criminal records from the FBI would not prohibit the responsible party from doing so.

(2) Disqualifying offense on record: The responsible party shall release the conditionally-hired applicant if the applicant's criminal record lists a disqualifying offense, unless the responsible party is able and willing to hire the applicant under the terms of rule 173-9-07 of the Administrative Code. If the responsible party is unable or unwilling to hire an applicant with a disqualifying offense on his or her criminal record, the responsible party shall release the conditionally-hired applicant regardless of the day during the sixty-day period that the responsible party obtained the criminal records.

(3) Deception: If a conditionally-hired applicant made any attempt to deceive the responsible party about his or her criminal record, the attempt is just cause for the responsible party to release the conditionally-hired applicant.

(E) Hiring released applicants: If a responsible party released a conditionally-hired

Addresses FAQ

applicant to comply with the sixty-day limit in paragraph (D)(1)(a) of this rule, the responsible party may resume hiring the released applicant after the responsible party obtains the criminal records if either one of the following two conditions exist:

(1) The applicant's criminal record does not list a disqualifying offense.

(2) The applicant's criminal record lists a disqualifying offense, but the responsible party is able and willing to hire the applicant under the terms of rule 173-9-07 of the Administrative Code.

173-9-06 **Disqualifying offenses.**

(A) Except as set forth in rule 173-9-07 of the Administrative Code, no responsible ~~entity~~ party shall ~~employ~~ hire an applicant or ~~continue to employ a person~~ retain an employee ~~in a position that involves providing ombudsman services or direct care~~ if the ~~person has been~~ applicant or employee was convicted of a violation of any of the following sections of the Revised Code:

(1) 959.13 (cruelty to animals);

(2) 959.131 (prohibitions concerning companion animals);

(3) 2903.01 (aggravated murder);

(4) 2903.02 (murder);

(5) 2903.03 (voluntary manslaughter);

(6) 2903.04 (involuntary manslaughter);

(7) 2903.041 (reckless homicide);

(8) 2903.11 (felonious assault);

(9) 2903.12 (aggravated assault);

(10) 2903.13 (assault);

(11) 2903.15 (permitting child abuse);

(12) 2903.16 (failing to provide for a functionally-impaired person);

(13) 2903.21 (aggravated menacing);

(14) 2903.211 (menacing by stalking);

(15) 2903.22 (menacing);

(16) 2903.34 (patient abuse and neglect);

(17) 2903.341 (patient endangerment);

(18) 2905.01 (kidnapping);

(19) 2905.02 (abduction);

(20) 2905.04 (child stealing, as it existed before July 1, 1996);

(21) 2905.05 (criminal child enticement);

(22) 2905.11 (extortion);

(23) 2905.12 (coercion);

(24) 2905.32 (trafficking in persons);

(25) 2905.33 (unlawful conduct with respect to documents);

(26) 2907.02 (rape);

(27) 2907.03 (sexually battery);

(28) 2907.04 (unlawful sexual conduct with a minor, formerly corruption of a minor);

(29) 2907.05 (gross sexual imposition);

(30) 2907.06 (sexual imposition);

(31) 2907.07 (importuning);

(32) 2907.08 (voyeurism);

(33) 2907.09 (public indecency);

(34) 2907.12 (felonious sexual penetration, as it existed before July 1, 1996);

(35) 2907.21 (compelling prostitution);

(36) 2907.22 (promoting prostitution);

(37) 2907.23 (enticement or solicitation to patronize a prostitute; procurement of a prostitute for another);

(38) 2907.24 (soliciting, engaging in solicitation after a positive HIV test);

(39) 2907.25 (prostitution);

(40) 2907.31 (disseminating matter harmful to juveniles);

(41) 2907.32 (pandering obscenity);

(42) 2907.321 (pandering obscenity involving a minor);

(43) 2907.322 (pandering sexually-oriented matter involving a minor);

(44) 2907.323 (illegal use of a minor in nudity-oriented material or performance);

(45) 2907.33 (deception to obtain matter harmless to juveniles);

(46) 2909.02 (aggravated arson);

(47) 2909.03 (arson);

(48) 2909.04 (disrupting public services);

(49) 2909.22 (soliciting or providing support for act of terrorism);

(50) 2909.23 (making terroristic threat);

(51) 2909.24 (terrorism);

(52) 2911.01 (aggravated robbery);

(53) 2911.02 (robbery);

(54) 2911.11 (aggravated burglary);

(55) 2911.12 (burglary);

(56) 2911.13 (breaking and entering);

(57) 2913.02 (theft);

(58) 2913.03 (unauthorized use of a vehicle);

(59) 2913.04 (unauthorized use of computer, cable, or telecommunication property);

(60) 2913.05 (telecommunications fraud);

(61) 2913.11 (passing bad checks);

(62) 2913.21 (misuse of credit cards);

(63) 2913.31 (forgery, forging identification cards);

(64) 2913.32 (criminal simulation);

(65) 2913.40 (medicaid fraud);

(66) 2913.41 (defrauding a rental agency or hostelry);

(67) 2913.42 (tampering with records);

(68) 2913.43 (securing writings by deception);

(69) 2913.44 (personating an officer);

(70) 2913.441 (unlawful display of law enforcement emblem);

(71) 2913.45 (defrauding creditors);

(72) 2913.46 (illegal use of SNAP or WIC program benefits);

(73) 2913.47 (insurance fraud);

(74) 2913.48 (workers' compensation fraud);

(75) 2913.49 (identify fraud);

(76) 2913.51 (receiving stolen property);

(77) 2917.01 (inciting to violence);

(78) 2917.02 (aggravated riot);

(79) 2917.03 (riot);

(80) 2917.31 (inducing panic);

(81) 2919.12 (unlawful abortion);

(82) 2919.121 (unlawful abortion upon minor);

(83) 2919.123 (unlawful distribution of an abortion-inducing drug);

(84) 2919.22 (endangering children);

(85) 2919.23 (interference with custody);

(86) 2919.24 (contributing to unruliness or delinquency of child);

(87) 2919.25 (domestic violence);

(88) 2921.03 (intimidation);

(89) 2921.11 (perjury);

(90) 2921.12 (tampering with evidence);

(91) 2921.13 (falsification, falsification in a theft offense, falsification to purchase a firearm, or falsification to obtain a concealed handgun license);

(92) 2921.21 (compounding a crime);

(93) 2921.24 (disclosure of confidential information);

(94) 2921.32 (obstructing justice);

(95) 2921.321 (assaulting or harassing a police dog, horse, or service animal);

(96) 2921.34 (escape);

(97) 2921.35 (aiding escape or resistance to lawful authority);

(98) 2921.36 (illegal conveyance of weapons, drugs or other prohibited items onto grounds of detention facility or institution);

(99) 2921.51 (impersonation of peace officer);

(100) 2923.01 (conspiracy, related to another disqualifying offense);

(101) 2923.02 (attempt to commit an offense, related to another disqualifying offense);

(102) 2923.03 (complicity, related to another disqualifying offense);

(103) 2923.12 (carrying concealed weapons);

(104) 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);

(105) 2923.123 (illegal conveyance, possession, or control of deadly weapon or ordnance into a courthouse);

(106) 2923.13 (having weapons while under disability);

(107) 2923.161 (improperly discharging a firearm at or into a habitation or school);

(108) 2923.162 (discharge of firearm on or near prohibited premises);

(109) 2923.21 (improperly furnishing firearms to minor);

(110) 2923.32 (engaging in a pattern of corrupt activity);

(111) 2923.42 (participating in criminal gang);

(112) 2925.02 (corrupting another with drugs);

(113) 2925.03 (trafficking in drugs);

(114) 2925.04 (illegal manufacture of drugs or cultivation of marijuana);

(115) 2925.041 (illegal assembly or possession of chemicals for the manufacture of drugs);

(116) 2925.05 (funding of drug or marijuana trafficking);

(117) 2925.06 (illegal administration or distribution of anabolic steroids);

(118) 2925.09 (illegal administration, dispensing, distribution, manufacture, possession, selling, or using of any dangerous veterinary drug);

(119) 2925.11 (possession of drugs);

(120) 2925.13 (permitting drug abuse);

(121) 2925.14 (illegal use, possession, dealing, selling, or advertising of drug paraphernalia);

(122) 2925.141 (illegal use or possession of marihuana drug paraphernalia);

(123) 2925.22 (deception to obtain dangerous drugs);

(124) 2925.23 (illegal processing of drug documents);

(125) 2925.24 (tampering with drugs);

(126) 2925.36 (dispensing drug samples);

(127) 2925.55 (unlawful purchase of a pseudoephedrine product, underage

purchase of a pseudoephedrine product, using false information to purchase a pseudoephedrine product, improper purchase of a pseudoephedrine product);

(128) 2925.56 (unlawfully selling a pseudoephedrine product; unlawfully selling a pseudoephedrine product to a minor; improper sale of a pseudoephedrine product);

(129) 2927.12 (ethnic intimidation); or,

(130) 3716.11 (placing harmful objects in food or confection).

(B) Except as set forth in rule 173-9-07 of the Administrative Code, no responsible ~~entity~~ party shall ~~employ~~ hire an applicant or ~~continue to employ a person~~ retain an employee ~~in a position that involves providing ombudsman services or direct care~~ if the ~~person~~ applicant or employee ~~has been~~ was convicted of 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 paragraph (A) of this rule.

173-9-07 **Four ways to hire an applicant, or retain an employee if the criminal record contains a disqualifying offense~~Disqualifying offense exclusionary periods; limited grandfathering; certificates; pardons~~.**

(A) Disqualifying offense exclusionary periods: Except as set forth in paragraphs (B), (C) and ~~(C)~~ (D) of this rule, a responsible ~~entity~~ party may ~~employ~~ hire an applicant or ~~continue to employ~~ retain an employee who was convicted of, or pleaded guilty to, an offense listed in rule 173-9-06 of the Administrative Code ~~in a position involving providing ombudsman services or direct care~~ pursuant to the following exclusionary periods:

(1) Tier I: Permanent exclusion: No responsible ~~entity~~ party shall ~~employ~~ hire an applicant or ~~continue to employ~~ retain an employee ~~in a position involving providing ombudsman services or direct care~~ if the applicant or employee was convicted of, or pleaded guilty to, an offense in any of the following sections of the Revised Code:

(a) 2903.01 (aggravated murder);

(b) 2903.02 (murder);

(c) 2903.03 (voluntary manslaughter);

(d) 2903.11 (felonious assault);

(e) 2903.15 (permitting child abuse);

(f) 2903.16 (failing to provide for a functionally-impaired person);

(g) 2903.34 (patient abuse or neglect);

(h) 2903.341 (patient endangerment);

(i) 2905.01 (kidnapping);

(j) 2905.02 (abduction);

(k) 2905.32 (human trafficking);

(l) 2905.33 (unlawful conduct with respect to documents);

(m) 2907.02 (rape);

(n) 2907.03 (sexual battery);

(o) 2907.04 (unlawful sexual conduct with a minor, formerly corruption of a minor);

(p) 2907.05 (gross sexual imposition);

(q) 2907.06 (sexual imposition);

(r) 2907.07 (importuning);

(s) 2907.08 (voyeurism);

(t) 2907.12 (felonious sexual penetration);

(u) 2907.31 (disseminating matter harmful to juveniles);

(v) 2907.32 (pandering obscenity);

(w) 2907.321 (pandering obscenity involving a minor);

(x) 2907.322 (pandering sexually-oriented matter involving a minor);

(y) 2907.323 (illegal use of a minor in nudity-oriented material or performance);

(z) 2909.22 (soliciting or providing support for an act of terrorism);

(aa) 2909.23 (making terroristic threats);

(bb) 2909.24 (terrorism);

(cc) 2913.40 (medicaid fraud);

(dd) If related to another offense under paragraph (A)(1) of this rule, 2923.01 (conspiracy), 2923.02 (attempt), or 2923.03 (complicity);

(ee) 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 (illegal use of SNAP or WIC program benefits) and paragraph (A)(2)(a)(xiii) of this rule; or,

(ff) 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 (A)(1)(a) to (A)(1)(ee) of this rule.

(2) Tier II: Ten-year exclusionary period:

(a) No responsible ~~entity~~ party shall ~~employ~~ hire an applicant or ~~continue to employ~~ retain an employee ~~in a position providing ombudsman services or direct care~~ for a period of ten years from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole, if the applicant or employee was convicted of, or pleaded guilty to, an offense in 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 before July 1, 1996);

(iv) 2905.05 (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 SNAP or WIC program benefits);

(xiv) 2913.48 (worker's compensation fraud);

(xv) 2913.49 (identity fraud);

(xvi) 2917.02 (aggravated riot);

(xvii) 2923.12 (carrying concealed weapons);

(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 ordnance into a 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 a minor);

(xxiv) 2923.32 (engaging in a pattern of corrupt activity);

(xxv) 2923.42 (participating in a 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 marijuana);

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

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

(xxxi) If related to another offense under paragraph (A)(2)(a) of this rule, 2923.01 (conspiracy), 2923.02 (attempt), or 2923.03 (complicity); 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 under paragraphs (A)(2)(a)(i) to (A)(2)(a)(xxxi) of this rule.

(b) ~~If an~~ An applicant or employee is subject to a fifteen-year exclusionary period if the applicant or employee was convicted of multiple disqualifying offenses, including an offense listed in paragraph (A)(2)(a) of this rule, and another offense or offenses listed in paragraph (A)(2)(a), (A)(3)(a), or (A)(4)(a) of this rule, and if the multiple disqualifying offenses are not the result of, or connected to, the same act~~, the applicant or employee is subject to a fifteen-year exclusionary period~~.

(3) Tier III: Seven-year exclusionary period:

(a) No responsible ~~entity~~ party shall ~~employ~~ hire an applicant or ~~continue to employ~~ retain an employee ~~in a position providing ombudsman services or direct care~~ for a period of seven years from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole, if the applicant or employee was convicted of, or pleaded guilty to, any offense in 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 a theft offense, falsification to purchase a 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 the grounds of a detention facility or institution);

(xxii) 2925.05 (funding drug trafficking);

(xxiii) 2925.06 (illegal administration of distribution of anabolic steroids);

(xxiv) 2925.24 (tampering with drugs);

(xxv) 2927.12 (ethnic intimidation);

(xxvi) If related to another offense under paragraph (A)(3)(a) of this rule, 2923.01 (conspiracy), 2923.02 (attempt), or 2923.03 (complicity); 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 under paragraphs (A)(3)(a)(i) to (A)(3)(a)(xxvii) of this rule.

(b) ~~If~~ An applicant or employee is subject to a ten-year exclusionary period if ~~an~~ the applicant or employee was convicted of multiple disqualifying offenses, including an offense listed in paragraph (A)(3)(a) of this rule, and another offense or offenses listed in paragraph (A)(3)(a) or (A)(4)(a) of this rule, and if the multiple disqualifying offenses are not the result of, or connected to, the same act~~, the applicant or employee is subject to a ten-year exclusionary period~~.

(4) Tier IV: Five-year exclusionary period:

(a) No responsible ~~entity~~ party shall ~~employ~~ hire ~~and~~ an applicant or ~~continue to employ~~ retain an employee ~~in a position providing ombudsman services or direct care~~ for a period of five years from the date the applicant or employee was fully discharged from all imprisonment, probation, or parole, if the applicant or employee was convicted of, or pleaded guilty to, an offense in 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, engaging in solicitation after a positive HIV 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 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 the unruliness or delinquency of a 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 or harassing a police dog, horse, or service animal);

(xxxiii) 2921.51 (impersonation of peace officer);

(xxxiv) 2925.09 (illegal administration, dispensing, distribution, manufacture, possession, selling, or using of any dangerous veterinary drug);

(xxxv) 2925.11 (drug possession), unless a minor drug possession offense;

(xxxvi) 2925.13 (permitting drug abuse);

(xxxvii) 2925.22 (deception to obtain a dangerous drug);

(xxxviii) 2925.23 (illegal processing of drug documents);

(xxxix) 2925.36 (illegal dispensing of drug samples);

(xl) 2925.55 (unlawful purchase of a pseudoephedrine product, underage purchase of a pseudoephedrine product, using false information to purchase a pseudoephedrine product, improper purchase of a pseudoephedrine product);

(xli) 2925.56 (unlawfully selling a pseudoephedrine product; unlawfully selling a pseudoephedrine product to a minor; improper sale of a pseudoephedrine product); or,

(xlii) If related to another offense under paragraph (A)(4)(a) of this rule, 2923.01 (conspiracy), 2923.02 (attempt), or 2923.03 (complicity); or,

(xliii) A violation of an existing or former municipal ordinance or law of this state, ~~nay~~ any other state, or the United States that is substantially equivalent to any of the offenses or violations described under paragraph (A)(4)(a)(i) to (A)(4)(a)(xli) of this rule.

(b) ~~If an~~ An applicant or employee is subject to a seven-year exclusionary period if the applicant or employee was convicted of multiple disqualifying offenses listed in paragraph (A)(4)(a) of this rule, and if the multiple disqualifying offenses are not the result of, or connected to, the same act~~, the applicant or employee is subject to a seven-year exclusionary period~~.

(5) Tier V: No exclusionary period: A responsible ~~entity~~ party may ~~employ~~ hire an applicant or ~~continue to employ~~ retain an employee ~~in a position providing ombudsman services or direct care~~ if the applicant or employee was convicted of, or pleaded guilty to, an offense in any of the following sections of the Revised Code:

(a) 2925.11 (drug possession), but only if a minor drug possession offense;

(b) 2925.14 (illegal use, possession, dealing, selling, or advertising of drug paraphernalia);

(c) 2925.141 (illegal use or possession of marihuana drug paraphernalia); or,

(d) 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 under paragraph (A)(5) of this rule.

(B) Limited grandfathering: A responsible ~~entity~~ party ~~may~~ may have ~~choose~~ chosen to ~~continue to employ~~ retain an employee ~~to provide ombudsman services or direct care who is~~ if the employee would otherwise have been excluded from employment ~~to provide~~ providing ombudsman services ~~or direct care~~ because the employee was convicted of, or pleaded guilty to, an offense(s) listed under paragraph (A)(4) of this rule, but only if:

(1) The responsible ~~entity~~ party hired the employee before January 1, 2013;

(2) The employee's conviction or guilty plea occurred before January 1, 2013; and,

(3) The responsible ~~entity~~ party ~~has~~ considered the nature and seriousness of the offense(s), and ~~attests~~ attested in writing before April 1, 2013, to the character and fitness of the employee based upon the employee's demonstrated work performance.

(C) Certificates: ~~Except for an individual with a disqualifying offense listed in paragraph (A)(1) of this rule, a~~ A responsible ~~entity~~ party may hire an applicant or ~~continue to employ~~ retain an employee with a disqualifying offense that is not one of the offenses listed under paragraph (A)(1) of this rule ~~who~~ if the applicant or employee was issued either a:

(1) 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,

(2) Certificate of achievement and employability in a home and community-based service-related field, issued by the department of rehabilitation and corrections pursuant to section 2961.22 of the Revised Code.

(D) Pardons: A responsible party may hire an applicant or retain an employee if the

applicant or employee has a conviction or a plea of guilty to an offense listed or described in rule 173-9-06 of the Administrative Code ~~shall not prevent an applicant's employment or an employee's continued employment~~ under any of the following circumstances:

(1) The applicant or employee was granted an unconditional pardon for the offense pursuant to Chapter 2967. of the Revised Code;

(2) The applicant or employee was 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 conviction or guilty plea was set aside pursuant to law; or,

(4) The applicant or employee was 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.

173-9-08 **Records: confidentiality and retention.**

(A) Confidentiality: Criminal records are not public records. The responsible party shall only make criminal records available to the following people:

(1) For ombudsman positions:

(a) The applicant or employee who is the subject of the criminal records check or the applicant's or employee's representative.

(b) The responsible party or the responsible party's designee.

(c) The state long-term care ombudsman or a representative of the office of the state long-term care ombudsman program who is responsible for monitoring the regional program's compliance.

(d) A court, hearing officer, or other necessary individual involved in a case dealing with any of the following:

(i) A denial of employment of the applicant or employee.

(ii) Employment or unemployment benefits of the applicant or employee.

(iii) A civil or criminal action regarding the medicaid program or an ODA-administered program.

(2) For direct-care positions:

(a) The applicant or employee who is the subject of the criminal records check or the applicant's or employee's representative.

(b) The responsible party that conducted the criminal records check or the responsible party's representative.

(c) The administrator of any other facility, agency, or program that employs direct-care positions that is owned or operated by the same party that owns or operates the responsible party that conducted the criminal records check.

(d) The employment service that conducted the criminal records check, if an employment service conducted the criminal records check.

(e) ODA's director and any person that the director authorizes to monitor responsible parties' compliance with Chapter 173-9 of the Administrative Code.

(f) The director of the Ohio department of medicaid and staff of the

department of medicaid who are involved in the administration of the medicaid program in either of the following two situations:

(i) A responsible party that is also a waiver agency conducted a criminal records check on an applicant or employee.

(ii) An employment service conducted a criminal records check on an applicant or employee that it referred to a responsible party that is also a waiver agency.

(g) A court, hearing officer, or other necessary individual involved in a case dealing with any of the following three situations:

(i) A denial of employment of the applicant or employee.

(ii) Employment or unemployment benefits of the applicant or employee.

(iii) A civil or criminal action regarding the medicaid program or an ODA-administered program.

(B) Records retention:

(1) Personnel files:

(a) What to retain: To verify compliance with Chapter 173-9 of the Administrative Code, for each applicant the responsible party hired or each employee the responsible party retained, the responsible party shall retain electronic or paper copies of the following records:

(i) The result of each of the database reviews.

(ii) Any criminal records including reverified records.

(iii) The written attestation to the character and fitness of the employee, if the responsible party completed a written attestation before April 1, 2013 to comply with paragraph (B)(3) of rule 173-9-07 of the Administrative Code.

(iv) A certificate of qualification for employment, if a court issued a certificate of qualification for employment to the employee.

(v) A certificate of achievement and employability, if the department of rehabilitation and corrections issued a certificate of achievement and employability to the employee.

(vi) A pardon, if a governor pardoned the employee.

(vii) The date the responsible party hired the employee. If the responsible party is a non-agency provider, the provider shall retain the date that he or she was certified by ODA. If the responsible party is a self-employed provider, the provider shall retain the date that he or she entered into a provider agreement with ODA (or ODA's designee).

(b) Sealed files: To comply with paragraph (A) of this rule, the responsible party shall retain the records that paragraph (B)(1) of this rule requires the responsible party to retain by sealing the records within the each applicant's or each employee's personnel files or by retaining the records in separate files from the personnel files. If the responsible party is a non-agency or self-employed provider, the responsible party shall simply retain the records.

(c) Retention period:

(i) The responsible party that is an ODA-certified provider shall retain records and make them available for monitoring purposes according to the timelines and other terms that paragraph (A)(5), (B)(5), (C)(5), (D)(5), or (F)(5) of rule 173-39-02 of the Administrative Code established.

(ii) The responsible party that is a non-certified provider shall retain records and make them available for monitoring purposes according to the timelines and other terms that paragraph (A)(20) of rule 173-3-06 of the Administrative Code established.

(2) Roster:

(a) A responsible party, other than a non-agency provider, shall maintain a roster of applicants and employees, accessible by ODA's director (or the director's designees), that includes, but is not limited to:

(i) The name of each applicant and employee.

(ii) The date the applicant or employee started to work for the responsible party.

(iii) The date the responsible party requested criminal records from BCII.

(iv) The date the responsible party obtained criminal records from BCII.

(v) A determination of whether the criminal records revealed that the applicant or employee committed a disqualifying offense(s).

(b) A responsible party that is a non-agency provider shall retain the following information, accessible by ODA's director (or the director's designees), that includes, but is not limited to:

(i) The date that ODA certified the responsible party.

(ii) The date the responsible party requested criminal records from BCII.

(iii) The date the responsible party obtained criminal records from BCII.

(iv) A determination of whether the criminal records revealed that the applicant or employee committed a disqualifying offense(s).

173-9-09 **Immunity from negligent hiring.**

In a tort or other civil action for damages that is brought as the result of an injury, death, or loss to person or property caused by an applicant or employee, all of the following apply:

(A) If the responsible party hired the applicant or retained the employee in good faith and reasonable reliance upon the applicant's or employee's criminal record, the responsible party shall not be found negligent solely because of its reliance on the criminal record, even if the criminal record is later determined to have been incomplete or inaccurate.

(B) If the responsible party conditionally hired the applicant in good faith and in a manner that complied with rule 173-9-05 of the Administrative Code, the responsible party shall not be found negligent solely because it hired the applicant before receiving the applicant's criminal record.

(C) If the responsible party in good faith hired the applicant or retained the employee because the applicant or employee met the standards in rule 173-9-07 of the Administrative Code that allow a responsible party to hire an applicant or retain an employee with a disqualifying offense on his or her criminal record, the responsible party shall not be negligent solely because the applicant or employee has been convicted of, or pleaded guilty to, a disqualifying offense.

173-9-10 **Disciplinary actions.**

ODA may take appropriate action against a responsible party that does not comply with Chapter 173-9 of the Administrative Code.