

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Mental Health and Addiction Services_____

Regulation/Package Title: Background Investigations for Employment

Rule Number(s): 5122-30-04, 31; 5122-33-03, 04, 05, 12, and 28; and 5122-35-03, 04, 11

Date: 11/18/2013

Rule Type:

☒ New

☒ Amended

☐ 5-Year Review

☐ Rescinded

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

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

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.

The Ohio Department of Mental Health and Addiction Services (OhioMHAS) is proposing three new rules and amending seven others to incorporate new requirements for background investigations for employees, staff, and others who have contact with residents of OhioMHAS regulated residential facilities.

Licensure Rules for Residential Facilities (Type 1, Type 2 and Type 3)

| Rule Number | Title | New, Amended, No Change or Rescinded Rule | Summary of Major Proposed Changes/Rule Subject |
|--------------------|--|--|--|
| 5122-30-04 | Licensure application and procedure | <ul style="list-style-type: none">• Rescind and replace with new | <ul style="list-style-type: none">• Update references to Ohio Department of Mental Health and Addiction Services and reflect re-numbering of Ohio Revised Code citations• Amend requirements to require criminal and other background checks on current and prospective operators, employees and volunteers with direct access to residents. |
| 5122-30-31 | Background investigations for employment | <ul style="list-style-type: none">• New | <ul style="list-style-type: none">• State requirements for conducting criminal records checks and other background investigation of current and prospective operators, employees and volunteers with direct access to residents.• Denote periods of exclusions for persons with certain criminal convictions using a tiered approach• Align with criminal background checks requirements of other state licensing agencies, including aging, jobs and family services and developmental disabilities, as well as other OhioMHAS licensed/certified residential facilities. |

Licensure Rules for Adult Care Facilities

| Rule Number | Title | New, Amended, No Change or Rescinded Rule | Summary of Major Proposed Changes/Rule Subject |
|--------------------|--|---|--|
| 5122-33-03 | License application and renewal procedures | <ul style="list-style-type: none">• Amend | <ul style="list-style-type: none">• Revise (A) to state that an ACF may not accept residents prior to licensure in order not to conflict with Ohio Administrative Chapter 5122-30• Update (D)(3) to reference new proposed background investigation rule 5122-33-28• Update references to reflect re-numbering of Ohio Revised and Administrative Code citations |
| 5122-33-04 | Application review process | <ul style="list-style-type: none">• Amend | <ul style="list-style-type: none">• Update (A) to reference new proposed background investigation rule 5122-33-28• Update references to reference department of mental health and addiction services |
| 5122-33-05 | Issuance, renewal, and denial of licenses | <ul style="list-style-type: none">• Amended | <ul style="list-style-type: none">• Update (H) to reference new proposed background investigation rule 5122-33-28• Eliminate (F) to reflect current practice and not to collect inspection fees and in accordance with Ohio revised Code• Update references to reflect re-numbering of Ohio Revised Code citations |
| 5122-33-12 | Facility management responsibilities | <ul style="list-style-type: none">• Amend | <ul style="list-style-type: none">• Update (A)(7) to reference new proposed background investigation rule 5122-33-28 |
| 5122-33-28 | Background investigations for employment | <ul style="list-style-type: none">• New | <ul style="list-style-type: none">• State requirements for conducting criminal records checks and other background investigation of current and prospective operators, employees and volunteers with direct access to residents.• Denote periods of exclusions for persons with certain criminal convictions using a tiered approach• Align with criminal background checks requirements of other state licensing agencies, including aging, jobs and family services and developmental disabilities, as well as other OhioMHAS licensed/certified residential facilities. |

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Certification Rules for Adult Foster Homes

| Rule Number | Title | New, Amended, No Change or Rescinded Rule | Summary of Major Proposed Changes/Rule Subject |
|--------------------|--|---|--|
| 5122-35-03 | Operator standards | <ul style="list-style-type: none">• Amended | <ul style="list-style-type: none">• Update references for criminal background checks |
| 5122-35-04 | Caregiver standards | <ul style="list-style-type: none">• Amended | <ul style="list-style-type: none">• Update references for criminal background checks |
| 5122-35-11 | Background investigations for employment | <ul style="list-style-type: none">• New | <ul style="list-style-type: none">• State requirements for conducting criminal records checks and other background investigation of current and prospective operators, employees and volunteers with direct access to residents.• Denote periods of exclusions for persons with certain criminal convictions using a tiered approach• Align with criminal background checks requirements of other state licensing agencies, including aging, jobs and family services and developmental disabilities, as well as other OhioMHAS licensed/certified residential facilities. |

Note that rules 5122-35-03 and 5122-35-04 contain references to area agencies on aging (AAA). These references are the carry-over from when these facilities were regulated by separate agencies. As part of the consolidation of the regulations regarding residential facilities, the rules are being reviewed and will be comprehensively amended in 2014. In the meantime, the rules are being amended with the minimum amount of changes to implement the statutory requirement for background checks.

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

R.C. 5119.34(K)

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

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

No.

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

Not applicable.

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

These rules implement that statutory intent of R.C. 5119.34(K) by requiring criminal record checks of those who have direct access to the residents of these facilities. The procedures in the rules will help to protect Ohio citizens and are aligned with similar initiatives at the Ohio Department of Aging and the Ohio Department of Developmental Disabilities.

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

OhioMHAS will measure the success of these rules by the compliance of regulated community during the licensing process.

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.

The rules were drafted to mirror, with limited exception, rules promulgated by JFS, DODD and Aging. The drafts were made available on the OhioMHAS website for a draft comment period from September 11, 2013 through October 11, 2013.

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

Based upon input provided during the development of the rules and during the formal comment period, some changes to the rules were implemented.

The Department received input on the dates in paragraph (F) of the background investigations rules. The drafts of the rule were based on the rules adopted by JFS, DODD, and Aging; and gave an unrealistic effective date for facilities to have conducted background checks. The rules now refer to the effective date of the rule and three months after the effective date of the rule, rather than a specific date.

The Department received a comment regarding the use of designated managers, and whether or not a designated manager would be necessary as most facilities would be owner operated.

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While many facilities are owner operated, this is not always the case and the ability to have a designated manager on site is important to the operation of these facilities.

Based upon internal comments, the requirements for background checks in all applicable facilities has been expanded to add inhabitants.

One commenter noted that rules 5122-35-03 and 04 refer to AAA's, which no longer regulate adult foster homes. However, the rules were reviewed and amended solely to incorporate the statutory requirement for background checks. The references to AAA's will be removed from the chapter at one time in the near future. In the meantime, the reference has been left as is for consistency.

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?

Not applicable.

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?

OhioMHAS believes this to be an appropriate level of regulation, commensurate with the vulnerability of the population being served.

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.*

No; a performance-based regulation is not appropriate for this standard and is not authorized by statute.

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

OhioMHAS is requiring background checks only for those who have direct access to facilities licensed by the Department, there is no statutory overlap with another agency in licensing these facilities.

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.

Many providers are already subject to conducting some type of criminal background check. Residential providers of services to children are generally required by child placing agencies to conduct criminal background checks. Adult Care Facilities and Adult Foster Home and

providers were previously required to conduct criminal background checks when licensed by the Department of Health or the Department of Aging, and the authority to require checks did not directly transfer when responsibility for licensing these entities transferred to OhioMHAS. Staff of the Office of Licensure and Certification who conduct provider compliance reviews will be trained to ensure the rule is applied consistently. The Department will disseminate information to providers in advance of the effective date of the rule and provide technical assistance as requested.

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;

These rules apply to all residential facilities, adult care facilities, and adult foster homes licensed by OhioMHAS pursuant to Revised Code 5119.34.

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

- Fees for BCII and FBI criminal records checks.
- Additional administrative time necessary to conduct database checks, request the criminal records check, and compile a personnel record.
- The addition of new disqualifying convictions may result in currently certified independent providers or existing employees of agency providers becoming ineligible to work with this population.

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.

Fee for BCII criminal records check:

The current fee is \$22.00. Local entities that conduct the checks may charge additional fees which vary.

Fee for FBI criminal records check for applicants/employees who have resided outside of Ohio in past five years:

The current fee is \$24.00. Local entities that conduct the checks may charge additional fees which vary.

There are currently 925 licensed residential facilities that will be subject to this requirement. The number of staff at the facilities ranges from 1 to more than 400. Some of these facilities have already been conducting some type of criminal background check in accordance with existing Department of Health and OhioMHAS department rules, children service agency contracts, and accrediting body requirements. The administrative costs to conduct each check will vary from provider to provider. Estimates prepared by the Department of Developmental Disabilities project that each background check will take twenty minutes and cost eight dollars in administrative overhead.

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

Background investigations of people providing services to vulnerable populations are necessary to ensure the health and safety of individuals receiving services, are the standard for prudent employment decisions, and ultimately protect employers from risk.

Regulatory Flexibility

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

The criminal records check is a statutory requirement and exemptions are inappropriate for this type of regulation.

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 does not apply.

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

OhioMHAS staff from the Office of License and Certification are available to provide technical assistance in explaining the standards. Additionally, the Ohio Attorney General's Bureau of Criminal Investigation can assist direct-care providers of any size with questions about obtaining and reading criminal records on their applicants and employees.