

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: OHIO DEPARTMENT OF AGING

Package Title: **CRIMINAL RECORDS CHECKS**
IMPLEMENT HB483, MAKE CLARIFICATIONS

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

Date: July 31, 2014, *Revised* on October 14, 2014

Rule Types:

- ☒ **5-Year Review:** Chapter 173-9
- ☒ **New:** 173-9-03.1, 173-9-04.1, 173-9-07.1
- ☒ **Amended:** 173-9-01, 173-9-02, 173-9-03, 173-9-04, 173-9-05
173-9-06, 173-9-07, 173-9-08, 173-9-09, 173-9-10
- ☒ **Rescinded:** 173-9-03.1, 173-9-04.1
- ☐ **No change:** None

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.

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

Amended Substitute House Bill Number 483 of the 130th Ohio General Assembly (HB483) amended the Revised Code regarding paid direct-care positions, but not paid ombudsman positions, as follows:

- The legislation adopted section 173.381 of the Revised Code to regulate database reviews and criminal records checks for self-employed providers. The new section defines “self-employed provider” and requires ODA “or its designee” to be the responsible party that reviews databases and checks criminal records.
- The legislation amended section 173.38 of the Revised Code to clarify that the consumer, as the employer of record, is the responsible party regarding his or her consumer-directed employee; plus, the consumer is the consumer-directed provider’s “chief administrator” when that the section uses that term.

The following graphic illustrates what is already law and what HB483 will make law.

CRIMINAL RECORDS CHECKS

IDENTIFYING THE RESPONSIBLE PARTY

IN 4 SCENARIOS

ALTHOUGH THE ILLUSTRATION USES A NURSE, THE LAW APPLIES TO ANY TYPE OF SELF-EMPLOYED PROVIDER



SINCE JANUARY 2013

Clara Barton, RN = employee of provider agency



Provider (Clara's employer) = responsible party

ORC§173.38(A)(12)(c)



NEW FOR SEPTEMBER, 2014

Clara Barton, RN = self-employed



ODA, AAA, or PAA = responsible party

ORC§173.381



SINCE SEPTEMBER, 2013

Clara Barton, RN = employee of sub-contractor



Sub-contractor (Clara's employer) = responsible party

ORC§173.38(A)(12)(d)

ORC§173.38(I)(5) says that ODA and its designees have access to the sub-contractors files to view criminal records.



Clara Barton, RN = self-employed sub-contractor



No one = responsible party

ORC§173.38(A)(12)(d) applies to *applicants* and *employees* of sub-contractors, but not *self-employed* sub-contractors.

ORC§173.381 applies only to the self-employed who are applying to be certified; already certified; bidding on a contract or grant; or already under a contract or grant. §173.381 doesn't mention sub-contractors.

No statute or rule presently prohibits sub-contracting with self-employed providers.

Therefore, ODA proposes to amend the rules of Chapter 173-9 of the Administrative Code to incorporate HB483's amendments to the Revised Code into the Administrative Code.

Proposed new rule 173-9-07.1 of the Administrative Code is part of ODA's implementation. It would prohibit ODA (or its designees) from rejecting a self-employed provider's application for ODA certification, revoke a self-employed provider's certification, reject a bid from a self-employed provider for a provider agreement, or terminate a self-employed provider's provider agreement solely because the self-employed provider has a disqualifying offense on his or her criminal record if one of the four ways listed in rule 173-9-07.1 of the Administrative Code apply. Those ways are: (1) not being in an exclusionary period, (2) limited grandfathering, (3) certificates, or (4) pardons. This is based upon the logic of 42 C.F.R. 431.51, which allows consumers to have a free choice of providers who are willing to furnish services through ODA's Medicaid-funded programs and who qualify to do so. If a self-employed providers' criminal record does not disqualify him or her from furnishing services, ODA's proposed new rule 173-9-07.1 of the Administrative Code would not allow the criminal record of a self-employed provider that the rule would redeem to be a reason to not certify the self-employed provider or enter into a provider agreement with the self-employed provider.

In addition to implementing HB483, ODA proposes to make the following non-substantive amendments. None of the following amendments would create adverse impacts for businesses:

- ODA proposes to correct paragraph (B)(2)(b) of rule 173-9-01 of the Administrative Code by replacing an errant use of "employee" with "applicant."
- ODA proposes to indicate in the definitions for "applicant" and "employee" that the direct-care position is limited to a position that involves the furnishing of good or services to consumers through an ODA-administered program.
- ODA proposes to consolidate the language in paragraphs (C)(1), (C)(1)(a), and (C)(2)(b) of rules 173-9-03 and 173-9-03.1 of the Administrative Code into paragraph (C)(1) of each rule. (During the public-comment period, ODA had proposed to expand the paragraphs into 6 paragraphs. ODA has since changed plans.)
- ODA proposes to eliminate the transportation positions working for county transit systems, regional transit authorities, regional transit commissions, or other providers from the tables in rule 173-9-03.1 and 173-9-04.1 of the Administrative Code because it is not possible to be an employee and also be subject to a rule on the self-employed. A self-employed transportation driver would be listed in the same tables under "all other self-employed direct-care positions not listed above."

- ODA proposes to replace any language in rules 173-9-03.1 and 173-9-04.1 that says “before applying” with “when applying.”
- ODA proposes to add language to paragraph (B)(2) of rule 173-9-03.1 of the Administrative Code to indicate that, after the self-employed provider is ODA-certified or has entered into a provider agreement, the responsible party may review the self-employed provider’s status in the databases at any time. But, the responsible party shall review the self-employed provider’s status in the databases no less often than each time the responsible party conducts a criminal records check according to one of the schedules in rule 173-9-04.1 of the Administrative Code. Some responsible parties may use the automated registry check system (ARCS) to check the 6 databases on a daily basis. This language would make it clear that ARCS is allowable.
- BCII has informed ODA that it plans to make rapback operational before the conclusion of 2014. After it is operational, a responsible party that uses rapback would not need to fingerprint employees (or self-employed providers) every five years. Therefore, ODA proposes to insert the following statement into rules 173-9-04 and 173-9-04.1 of the Administrative Code for clarity:

[If a responsible party complies with the requirements for rapback, the responsible party is conducting criminal records checks on a daily basis, which is a less-than-five-year schedule.](#)

- ODA proposes to remove the erroneous reference to rule 173-9-05.1 of the Administrative Code that is presently listed in rules 173-9-04.1 of the Administrative Code.
- ODA proposes to change the title of rule 173-9-05 from “conditional hiring” to “conditional status,” because the rule also covers reasons to release conditionally-hired applicants and the hiring of released applicants.
- ODA proposes to amend paragraph (A) of rule 173-9-05 of the Administrative Code to indicate that the rule addresses the conditional hiring of applicants for paid ombudsman positions, the conditional hiring of applicants for paid direct-care positions with agency providers or with consumers through the consumer-directed arrangements, the reasons to release conditionally-hired applicants, and the hiring of released applicants.
- In rule 173-9-05 of the Administrative Code, after “The rule does not require a conditional status for employees,” ODA proposes to add “who hold paid ombudsman positions or paid direct-care positions”
- ODA proposes to add “from an employment service” after “referral” in paragraphs (B) and (C) of rule 173-9-05 of the Administrative Code to highlight that the distinction between the paragraphs is a referral *from an employment service*, not any other type of referral.

- In paragraph (D)(1)(a) of rule 173-9-05 of the Administrative Code, after “The responsible party shall release the conditionally-hired applicant” ODA proposes to add “from a paid ombudsman position or paid direct-care position.” ODA proposes to add this language to indicate that a responsible party (*i.e.*, employer) could continue to pay the conditionally-hired applicant in another capacity. The applicant would only be barred from paid ombudsman positions or paid direct-care positions.
- Into the introductory paragraph of rule 173-9-07 of the Administrative Code, ODA proposes to cite paragraphs (A), (B), (C), and (D) of the rule.
- In paragraph (A) of rule 173-9-07 of the Administrative Code, ODA proposes to replace “pursuant to the following exclusionary periods” with “unless an exclusionary period in paragraph (A)(1), (A)(2), (A)(3), or (A)(4) of this rule prohibits hiring the applicant or retaining the employee.”
- In paragraph (B) of rule 173-9-07 of the Administrative Code, ODA proposes to correct the unintended omission of paid direct-care positions from the paragraph.
- ODA proposes to insert the following language into rule 173-9-07 of the Administrative Code to be helpful:

(A person may petition for a certificate of qualification for employment on "The Ohio Certificate of Qualification for Employment Online Petition Website" or <https://www.drccqe.com/>)

In previous phases in the reform of criminal records check regulations, ODA collaborated with the Governor, the Ohio Attorney General, the Office of Health Transformation, the Departments of Developmental Disabilities, Health, Medicaid, and Rehabilitation and Corrections to develop substantially uniform regulations on database reviews and criminal records checks for home and community-based long-term care employees who are regulated by the rules of the Departments of Aging, Developmental Disabilities, Health, and Medicaid. ODA’s proposal to implement HB483’s amendments and to add clarifying amendments and a helpful amendment, would allow ODA’s rules to remain substantially uniform with those of the Departments of Developmental Disabilities, Health, and Medicaid. This uniformity is expressed in the unofficial guide that ODA attached to this BIA.

Lastly, because ODA has reviewed every rule in Chapter 173-9 of the Administrative Code as part of this project, ODA’s review complies with the review in section 106.03 of the Revised Code, which requires ODA to review each rule before the deadline that ODA established for doing so. Division (B) of Section 106.031 of the Revised Code requires ODA to establish each rule’s review deadline no more than five years after the previous review.

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, 173.38, and 173.381 of the Revised Code.
- 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 Medicaid 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, in 2012, ODA and the Departments of Developmental Disabilities, Health, and Medicaid 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. Section 173.381 does the same, except that it requires ODA, the area agency on aging (AAA), or the PASSPORT administrative agency (PAA) to review the databases and conduct the criminal records checks for self-employed providers instead of allowing the providers to review the same in order to determine if their criminal records allow them to work in a paid direct-care position.

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)?

Sections 173.27, 173.38, and 173.381 of the Administrative Code require ODA to adopt rules.

Additionally, in a letter of December 21, 2011, Attorney General Mike DeWine said the following:

“[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.”

Greg Moody of the Governor’s Office of Health Transformation responded as follows:

“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.

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.

- **Identifiable Self-Employed Providers:** The business stakeholders that would experience change through this round of rule development are limited to the 2 self-employed providers who have provider agreements (*i.e.*, contracts or grants) with 1 AAA to serve consumers through ODA's programs and the unknown number¹ of self-employed providers who serve consumers in ODA's programs that require provider certification are business stakeholders.
- **Consumers Who Direct Consumer-Directed Providers and Consumer-Directed Providers:** ODA's consumer-directed providers are also business stakeholders, but the changes that HB483 made to statute and that ODA proposes to implement into the rules offer clarity. They do not create any substantive changes. ODA determined that the nature of the amendments did not warrant surveying the consumers who direct consumer-directed providers or consumer-directed providers for this BIA's purposes.
- **ODA's Designees, the AAAs and PAAs:** Although, as ODA's designees, AAAs and PAAs are not considered to be businesses for the purposes of the Common-Sense Initiative, they must review databases and check criminal records on self-employed providers when HB483 takes effect. ODA contacted each AAA and PAA on June 4 to notify them of the legislation and to encourage them to register to participate in the 2014 pilot phase of the automated registry check system (ARCS) and rapback. ARCS, which is operational, simplifies and reduces the costs of reviewing databases. After it is operational, rapback would do the same for checking criminal records.
- **Fielding Questions:** ODA regularly fields providers', AAAs', and PAAs' questions about Chapter 173-9 of the Administrative Code.
- **Public-Comment Period:** From September 8 to September 21, ODA posted this BIA and the proposed new rules on its website for an online 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?

By fielding providers' questions, ODA has learned that providers want to send applicants to petition for certificates of qualification for employment. However, it is not clear where one makes such a petition. Therefore, ODA proposes to add a

¹ Please see ODA's response to #14a for more information.

helpful statement to rule 173-9-07 of the Administrative Code that names the website and provides its URL.

By fielding providers' and AAAs'/PAAs' questions, ODA also learned providers, AAAs, and PAAs aren't certain if participating in ARCS and rapback eliminates the need to review databases every 5 years or the need to take fingerprints every 5 years for BCII's fingerprint-based criminal records checks. ARCS reviews databases on a *daily* basis. Rapback, once operational, would do the check criminal records on a *daily* basis. Because a daily basis more-than-satisfies the requirement to check *every 5 years*, ODA proposes to add helpful statements to rules 173-9-04 and 173-9-04.1 of the Administrative Code that declare that the responsible party automatically complies with the 5-year requirements if it participates in ARCS and rapback. Responsible parties must conduct a database review before every criminal records check, so ODA is only proposing to add this clarification regarding criminal records checks. If the criminal records checks are on the "less-than-five-year schedule," then the database reviews are automatically on the same schedule. It is also not possible to participate in either ARCS or rapback. A responsible party has the option to participate in both or neither.

During ODA's online public-comment period, ODA received zero comments upon the rule proposals.

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?

As stated in the BIA for the version of the rules that took effect on January 1, 2013 these rules have an empirical foundation, particularly rule 173-9-07 of the Administrative Code. As ODA listed the following resources in the BIA for that round of development:

ODA and the Depts. of Developmental Disabilities, Health, and [Medicaid] 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 does not have an option to invent alternative regulations when it is implementing legislation that doesn't allow for such options. That is the case for HB483.

Regarding clarifications, ODA's alternative is to not add the helpful language. ODA resolves that adding the language is better than not adding the language.

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, 173.38, and 173.381 of the Revised Code apply to all responsible parties listed in those sections regardless of their performance. Regarding database reviews and criminal records checks, ODA does not have the ability to regulate differently based upon 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, 173.38, and 173.381 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.

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;

Total Direct-Care Positions: For the version of these rules that took effect on January 1, 2013, ODA worked with 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, 1.5 years later, the estimated number of direct-care positions remains around 93,910.

Total Self-Employed Providers in Direct-Care Positions (ODA Only): The primary impact of HB483's amendments to Chapter 173-9 of the Administrative Code is the transfer of duty from the self-employed provider to ODA, the AAAs, or the PAAs. After HB483's effective date, the latter must review databases and conduct criminal records checks on behalf of the self-employed providers.

- **AAAs:** Self-employed providers may work with AAAs to furnish many services. Between June 12 and 18, ODA received reports from AAAs on their volume of provider agreements (*i.e.*, contracts and grants) with self-employed providers. Of all the AAAs, only AAA10A (Cleveland area) had such agreements. The AAA had entered into provider agreements with 2 self-employed carpenters to widen doors for wheelchairs, build wheelchair ramps, *etc.*, as part of home-modification services to seniors through the Older Americans Act programs.
- **PAAs:** ODA's rules in Chapter 173-39 of the Administrative Code allow self-employed providers to work with PAAs to furnish 10 different services. As of June 16, ODA's unduplicated count of certified providers that furnish those services is 524. Unfortunately, ODA's database does not presently differentiate between agency and self-employed providers, so ODA does not have a simple method for determining which of the 524 providers are agency providers and which are self-employed providers.

If every one of the 524 providers were self-employed, they would only represent less than 1% of the total direct-care positions in Ohio.² However, ODA assumes that very few of the 524 providers are self-employed. If ODA's assumption is true, then only a fraction of 1% of all direct-care positions in Ohio are held by self-employed providers.

In September, ODA verified its assumption. ODA polled its PAAs to see how many self-employed providers were working with them. The poll indicated that the volume of self-employed providers statewide to be very low. At the time of this printing of this BIA, the author had results from a sample of 7 of the 13 PAAs. Here are the results of that sample:

- **2 in PSAs 2+3 (Dayton + Lima areas):** PAA3 reported that it is working with 2 self-employed providers, both of whom were licensed independent social workers who furnish counseling services to consumers. PAA2 reported that it is working with 1 self-employed provider. That self-employed provider is the one of the same social licensed independent social workers that is working with PAA3.
- **2 in PSA 4 (Toledo area):** PAA4 reported that it is working with 2 self-employed providers. 1 furnishes transportation. 1 furnishes pest control.
- **16 in PAA5 (Mansfield area):** PAA5 reported that it is working with 3 unduplicated³ licensed independent social workers who furnish counseling services to consumers. PAA5 is also working with 10 self-employed providers that perform either minor home modifications⁴ or both minor home modifications and a second service such as chores,⁵ home medical equipment,⁶ or pest control. 2 more providers furnish only home medical equipment and 1 more provider furnishes only pest control.
- **2 in PSA6 (Columbus area):** PAA6 reported that it is working with 2 self-employed providers, both of whom perform minor home modifications.
- **4 in PSA9 (Steubenville area):** PAA9 reported that it is working with 4 self-employed providers furnishing services to consumers through the PASSPORT Program. 1 performs minor home modifications. The other 3 all furnish personal emergency

² Which, as previously stated, is 93,910 positions.

³ PAA5 also reported that an additional (*i.e.*, a 4th) licensed independent social worker works with them, but it is the same LISW who also works with PAAs 2 + 3 and appears in PAA3's count.

⁴ Widening doors for wheelchair passage, building wheelchair ramps, *etc.*

⁵ Raking leaves, *etc.*

⁶ 1 provider furnishes minor home modification and home-medical equipment, which seems to be walk-in bath tubs.

response systems (PERS) under rule 173-39-02.6 of the Administrative Code.⁷ 2 of those providers also furnish a second service: 1 performs minor home modifications. 1 furnishes home medical equipment.⁸

- **3 in PSA10B (Akron area):** PAA10B reported that it is working with 3 self-employed providers. 1 is a licensed dietitian who furnishes nutrition counseling. 1 furnishes home-delivered meals. 1 furnishes minor home modification.
- **1 in PSA11 (Youngstown area):** PAA11 reported that it is working with 1 self-employed provider. She is a licensed dietitian who furnishes nutrition counseling.

If the results from the remaining 5 PAAs were similar, there would be an average of 3.75 self-employed providers working with each PAA.

Conclusion: If ODA combined the confirmed 2 self-employed providers in provider agreements with AAA10A with the estimated 3.75 self-employed providers for each of Ohio's 13 PAAs, ODA estimates that Ohio has 50.75 self-employed providers working with ODA's programs. This estimate represents 0.054%, or 1/19th of 1%, of Ohio's direct-care positions.

Potential Increase in Future Years: There is a potential that the volume of self-employed providers may increase in years to come. This is because case managers for the PASSPORT Program may now authorize two new services that are provided by self-employed providers. These providers are likely to be the same self-employed providers that furnish identical services to those enrolled in Ohio Dept. of Medicaid programs as "independent providers." Please see ODA's response to BIA question #16 for more information on these independent providers.

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 burdens of reviewing databases and conducting the checks and the evolving laws on doing so, plus potential job losses due to criminal records.

c. Quantify the expected adverse impact from the regulation.

⁷ All 3 provides sub-contracted with other providers for the central monitoring station (*i.e.*, emergency response call center) component of the PERS. This would leave the self-employed provider with the duties of installing equipment, maintaining equipment, setting-up emergency contacts for consumers, educating the consumers on how to use the equipment, and handling matters of billing with the PAA.

⁸ It is common for a provider of PERS to also furnish home medical equipment. This is particularly the case because PERS and medication dispensing systems are often based upon the same technology and sold by the same companies.

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, a direct impact:

- Reviewing databases incurs no fees.
- Checking criminal records incurs two types of fees, unless the responsible party participates in rapback.
 - There are \$22 fees that each responsible party must pay to BCII plus the impression costs that the responsible party must pay to the fingerprint takers (e.g., license agency, county sheriff's office, city police). For example, in late 2012, the Ohio Attorney General's online WebCheck® locator says that the Cincinnati BMV charges \$32 for a criminal records check, which is \$22 (for BCII) plus \$10 (for the BMV).
 - 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 BCII) plus \$939,100 (for the BMV).
 - The implementation of rapback will replace both fees with a new, lesser fee. Using the Cincinnati BMV's prices, Home Care by Black Stone calculated in 2012 that it would need to pay \$40,000 for each 5-year round of criminal records checks that it conducted on its 1,256 direct-care employees who provide personal care services. Rapback will cost \$5 per year per person that the responsible party checks. That means that Home Care by Black Stone would spend \$31,400 in fees to check the same number of employees on a daily basis over a 5-year period. That's a savings of \$8,600 every 5 years in fees.

Administrative Burdens, an Indirect Impact:

Providers have claimed that reviewing databases and conducting criminal records checks seems to take too much administrative time. The implantation of ARCS and rapback in 2014 will automatically review the databases and check the criminal records of each employee that the responsible party enters into the system. ARCS and rapback eliminate the needs to manually review databases, take fingerprints, and conduct fingerprint-based criminal records checks every 5 years. The only administrative burden will be the one-time set-up of the employees into the system.

HB483's amendments would require ODA, the AAAs, and the PAAs to be the responsible parties who check review the databases and check the criminal

records for the self-employed providers. HB483's amendment requires ODA, the AAAs, and the PAAs to pay a fee for the criminal records checks (or \$5/year for rapback) or ODA, the AAAs, and the PAAs may pass the cost on to the self-employed providers that require the reviews and checks.

To alleviate the burden to a newly-certified provider who is self-employed, between the signing of HB483 and its effective date, ODA is reviewing the databases and conducting criminal records checks on self-employed providers to prevent a need to conduct one's own reviews and checks followed by a second need for ODA to do so again less than 90 days later.

Joblessness, an indirect impact:

If a person is convicted of a criminal offense that it listed in rule 173-9-07 of the Administrative Code, it is possible that the responsible party would not be able to hire or retain the employee. If the responsible party is one of the AAAs, it is possible that the responsible party would not be able award a contract or grant to a self-employed bidder or may need to terminate a contract or grant to a self-employed provider. If the responsible party is ODA or one of the PAAs, it is possible that the responsible party will not be able to certify the self-employed provider or may need to revoke the self-employed provider's certification.

Rule 173-9-07 of the Administrative Code minimizes any potential joblessness by offering 4 ways that a responsible party may hire a person with certain convictions on his or her criminal record.

Proposed new rule 173-9-07.1 of the Administrative Code would minimize the likelihood that a self-employed provider would have no business with ODA's programs. As previously stated, proposed new rule 173-9-07.1 of the Administrative Code would prohibit ODA (or its designees) from rejecting a self-employed provider's application for ODA certification, revoke a self-employed provider's certification, reject a bid from a self-employed provider for a provider agreement, or terminate a self-employed provider's provider agreement solely because the self-employed provider has a disqualifying offense on his or her criminal record if one of the four ways listed in rule apply.

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 previous rounds of developments to Chapter 173-9 of the Administrative Code. For all rule projects on this topic, ODA states the following:

Based upon the Ohio Attorney General's concerns over the safety of vulnerable Ohioans who receive in-home care services, and because [legislation] 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.

Additionally, of the state's long-term care agencies (*i.e.*, Aging, Developmental Disabilities, Health, and Medicaid), ODA is the last agency to have legislation put an end to the practice of allowing self-employed providers to self-determine whether or not their criminal records bar them from direct-care employment. Thus, it puts an end to protections that are only based upon an "honor system."

Finally, as the chart below⁹ illustrates, the Ohio Attorney General's office finds that the self-employed providers that currently work in the programs of the Dept. of Medicaid are more prone to commit fraud than other types. Medicaid's self-employed providers are called "independent providers" and are listed as such in the chart.



The dramatically-higher incidence of fraud convictions for self-employed providers is a sound reason for ODA to amend Chapter 173-9 of the Administrative Code to implement HB483's requirements for ODA (or its designees) to review databases and check criminal records when determining if they qualify for ODA certification or for provider agreements.

⁹ Lloyd Early, Special Agent-In-Charge. "Criminal Records Check Webinar: Ohio Council for Home Care and Hospice." Office of Ohio Attorney General Mike DeWine. December 5, 2012.

Regulatory Flexibility

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

Sections 173.27, 173.38, and 173.381 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 for small businesses from penalties for first-time paperwork violations. That general statute does not override the specific criminal records requirements in sections 173.27, 173.38, and 173.381 of the Revised Code. Therefore, not obtaining a criminal records report is not a paperwork violation and 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 or 173.381 of the Revised Code. The section does not mention a first-time paperwork violation.

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

ODA does not offer different discriminate between responsible parties, applicants, or employees based upon the size of the business or organization. In fact, the vast majority of businesses that Chapter 173-9 of the Administrative Code regulates are small businesses according to section 119.14 of the Revised Code.¹⁰

ODA maintains an online rules library to assist all responsible parties (and the general public) to find the rules that regulate them. Responsible parties (and the general public) may access <http://aging.ohio.gov/information/rules/default.aspx> 24 hours per day, 365 days per year. In the library, ODA also publishes FAQs on this chapter in the library (<http://aging.ohio.gov/information/rules/faq.aspx>). In September, 2014, viewers accessed the FAQ page 1,062 times.

¹⁰ Section 119.14 of the Revised Code defines “small business: to have the same meaning as in 13 C.F.R., Part 121 (January 1, 2014 edition), which uses North American Industry Classification System (NAICS) codes to classify small businesses. For NAICS codes 621310 [personal care], 621910 [personal emergency response systems], 624210 [meal delivery programs], and 624120 [adult day centers, senior centers, homemaker services], 13 C.F.R., Part 121 establishes the standard threshold for a small business in terms of annual receipts of \$14-million/year for 621310 and 621910 and \$10 million/year for 624210 and 624120.

ODA, the AAAs, and the PAAs are available to help responsible parties and applicants and employees of paid ombudsman positions and paid direct-care positions with their questions.

Additionally, any person may contact Tom Simmons, ODA's policy manager and regulatory ombudsman, with questions about the rules. (rules@age.ohio.gov)