

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Health

Regulation/Package Title: Chapter 3701-64 - Abuse or Neglect of Resident or Misappropriation of Property in Long-Term Care Facilities

Rule Number(s): 3701-64-01 to 3701-64-05

Date: September 22, 2015 **UPDATED** October 30, 2015

Rule Type:

☐ New

☒ Amended

☒ 5-Year Review

☐ Rescinded

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

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

3701-64-01 - The rule sets forth the definitions used in Chapter 3701-64 of the Administrative Code.

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Amendments have been made to clarify (1) who may be subject to an investigation; and (2) that sexual contact between the accused and a resident is equivalent to physical abuse. Minor technical amendments have also been made to conform to the Legislative Services Commission's rule drafting standards.

3701-64-02 - The rule sets forth the requirements for ODH to conduct investigations of allegations of abuse or neglect, requirements for the content of a notice, and the hearing rights of an accused.

Amendments have been made to (1) change references to the Division of Quality Assurance to the Office of Health Assurance and Licensing; (2) allow ODH to provide written notice to entities associated with an individual (e.g., another nursing home); (3) clarify language requiring mailing of notice of allegations and the right to a hearing; (4) remove the requirements that ODH publish a notice one time per week in a local paper when service has failed, instead requiring posting of a notice on the ODH website for 21 consecutive days. Minor technical amendments have also been made to conform to the Legislative Services Commission's rule drafting standards.

3701-64-03 – This rule sets forth the timeframes for both an accused to request a hearing and for the director to hold a hearing.

The rule has been amended to reduce the timeframe in which a hearing may be held from one-hundred and twenty (120) days to sixty (60) days. Minor technical amendments have also been made.

3701-64-04 – This rule sets forth the procedures to be used in a hearing.

The rule is being proposed without amendment.

3701-64-05 – This rule sets forth the procedures for ODH to follow when making a finding of abuse or neglect. The rule also sets forth the procedures for an individual who has a single finding of neglect must follow to petition ODH for removal from the nurse aide registry.

Amendments to the rule: (1) condense duplicative language; and (2) allow for settlement agreements between ODH and the accused. Cross-citations have also been updated.

Based on comments received by stakeholders and review of applicable law, ODH is removing this language from the draft rules.

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

Section 3721.26 of the Revised Code.

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

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

No.

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

No.

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)?

Collectively, these rules serve to protect the health and safety of residents in Ohio's long term care settings (nursing homes and residential care facilities) by requiring the report of allegations of abuse, neglect, or misappropriation to ODH for investigation. When there is sufficient evidence to warrant a finding against an individual, that individual is barred from working in another long term care setting.

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

Successful outcomes are measured through a standard survey (inspection) process. This process is generally conducted once every fifteen months. Successful outcomes would be indicated by a finding of compliance with the proposed rule requirements. Further evidence of success would be represented by the number of complaints received and the number of validated complaint surveys.

Additionally, the number of hearings against accused individuals and the number of findings are a measurable outcome.

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.

In addition to other state agencies, including the:

Department of Medicaid, and

Department of Aging;

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ODH submitted draft rules for preliminary comment to stakeholders, including the:

Academy for Senior Health Sciences;
Leading Age Ohio;
Ohio Assisted Living Association; and
Ohio Health Care Association.

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

LeadingAge made several comments as follows:

Comment 1: No timeline given for updating STNA registry

Response: As an order of business, ODH updates the registry immediately upon a finding of abuse, neglect or misappropriation.

Comment 2: Time frame for investigation and hearing not specified allowing staff members to work in other facilities during investigation.

Response: ODH cannot provide a timeframe for investigating allegations of abuse, neglect or misappropriation as it would impact our ability to conduct a thorough investigation. ODH has proposed to cut the timeframe for hearings in half, from 120 days to 60, to help protect both facilities that may unknowingly hire an individual under investigation, and long term care facility residents. ODH also has authority to conduct hearings sooner than 60 days (“not later than”) when warranted.

Comment 3: 3705-64-05 – Failure of facility to provide adequate staffing – based on what criteria?

- o (C) 2 – Does the registry or Board of Nursing keep a record of facilities that have checked the status of potential employees so they would have knowledge of where they may currently be employed or have been employed? Applicants do not include complete employment history if there have been performance issues or allegations.
- o How often is registry updated?

Response: Issues surrounding adequate staffing (and supplies, which are also referenced in rule 3701-64-05) is an evidentiary issue and would be determined by the hearing officer based on evidence presented during the hearing.

Issues related to nurse licensure and or employment history are within the purview of the Board of Nursing. When ODH makes a finding against a licensed professional, the appropriate licensing entity is notified. What that entity does with that information is that entity’s business process. ODH still lists that individual as ineligible to work in a long-term care facility on the Nurse Aide Registry.

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As an order of business, ODH updates the registry immediately upon a finding of abuse, neglect or misappropriation.

Comment 4: Expunging all records of investigations may miss opportunity to identify a trend of poor performance.

Response: This is a matter of due process for an individual accused against whom there is not sufficient evidence to make a finding.

8. 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.

9. 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?

ODH did not consider any alternatives to the proposed regulation. Section 3721.26 of the Revised Code requires ODH to prescribe requirements in this area. The rule reflects the current statutory requirement.

10. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

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

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

The agency conducted a thorough review of the Ohio Revised Code and Ohio Administrative Code to ensure there are no other regulations in place regarding investigations and hearing processes for allegations of abuse, neglect or misappropriation. While Title 29 of the Revised Code provides for criminal penalties in this area, which may also result from an investigation, neither section 3721.26 of the Revised Code nor Chapter 3701-64 of the Administrative Code provide for criminal penalties.

12. 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.

An on-site survey may be initiated to determine compliance with this rule. The survey will be done by long-term care program staff using a standard survey tool. This staff will have been trained in the survey process, including understanding of the regulation.

Additionally, trained and knowledgeable abuse, neglect and misappropriation program staff may also conduct an investigation into an allegation of abuse, neglect and misappropriation.

Adverse Impact to Business

13. 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;

As of September 11, 2015, there are:

935 licensed nursing homes; and
664 licensed residential care facilities.

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

Notification to the Department of allegation of abuse, neglect or misappropriation by an individual associated with the facility.

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.

ODH estimates approximately 15 minutes of facility staff time is dedicated to reporting an allegation of abuse, neglect or misappropriation to ODH at an average hourly wage of \$45.56 and assuming each notification was done by the facility administrator.

*All figures from United States Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages for the State of Ohio, May, 2014, using the code for Medical and Health Services Managers (11-9111).

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

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These rules implement sections 3721.21 to 3721.26 of the Revised Code, which serve to protect the health and safety of residents in Ohio's long term care settings (nursing homes and residential care facilities).

Regulatory Flexibility

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

No. The reporting of allegations of abuse, neglect and misappropriation is required regardless of the size of the business.

16. 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?

ODH is committed to the goal of ensuring that regulated customers have the opportunity to achieve compliance with ODH's procedural requirements. Therefore, when it is both feasible and appropriate, ODH will provide one (1) warning letter to a regulated customer who commits a first time or isolated violation of a "minor" paperwork or procedural requirement, such as failing to submit a timely and complete license renewal application or other required documentation to ODH. ODH will not impose a civil monetary penalty for such a violation, and will give the customer a reasonable amount of time to correct the violation, unless:

1. The violation constitutes a failure to comply with federal laws or regulations enforced by ODH, and the penalty is mandated by federal law;
2. The Director of Health or one of his designees has determined that the violation poses an actual or potential threat to the health, safety, or welfare of the general public;
3. The violation involves knowing or willful conduct that may result in conviction for a felony;
4. Failure to impose the penalty would impede or interfere with the detection of criminal activity; or
5. The violation pertains to the assessment or collection of any monies owed to the state.

This Policy Statement should not be construed as a waiver of ODH's authority to enforce any law or regulation requiring a person or entity to obtain a valid permit or license before engaging in regulated activity, or enforce any other state or federal law.

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This policy is available online at:

<http://www.odh.ohio.gov/rules/ombudsman/regulatoryombudsman.aspx>.

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

The agency maintains program staff that can assist and provide guidance to licensees through the Bureau Long Term Care Quality:

<http://www.odh.ohio.gov/odhprograms/ltc/nurhome/nurhome1.aspx> and

<http://www.odh.ohio.gov/odhprograms/ltc/Residential%20Care%20Facilities/Main%20Page.aspx>, as well as the Bureau of Regulatory Enforcement:

<http://www.odh.ohio.gov/odhprograms/rc/ANM.aspx>