

# CSI - Ohio

## The Common Sense Initiative

### Business Impact Analysis

Agency Name: Ohio Department of Medicaid

Regulation/Package Title: ODM-adm Waiver Programs: Criminal Record Checks

Rule Number(s): OAC Rules 5160-45-07, 5160-45-08 and 5160-45-11

Date: 10/26/17

**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☐ Rescinded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.*

OAC Rules 5160-45-07, 5160-45-08 and 5160-45-11 implement the criminal record check requirements set forth in sections 105.72, 105.721, 5162.03, 5164.341, 5164.342 and 5166.02 of the Revised Code. The rules require each applicant for, and every employee in, a full-time, part-time or temporary position that involves providing home and community-based services (HCBS) to individuals enrolled on an Ohio Department of Medicaid (ODM) –administered waiver program to undergo a criminal records check from the Bureau of Criminal Investigation (BCI).

An additional Federal Bureau of Investigation (FBI) criminal records check is required if the applicant or employee cannot prove continued residency in Ohio for the previous five years. Additionally, the rules set forth a recheck requirement of every five years for agency employees and permit the use of the Retained Applicant Fingerprint Database (RAPBACK) for agency employees and independent providers. The rules provide the list of disqualifying offenses that may prohibit an individual from working in a position that involves providing HCBS. Further, the rules authorize the conditional employment by an agency of an individual for up to sixty days while awaiting the results of the criminal records check. Finally, the rules establish the exclusionary periods for which individuals convicted of certain crimes may not be hired.

OAC Rules 5160-45-07, 5160-45-08 and 5160-45-11 are being amended as a result of five-year review. OAC rule 5160-45-08 also includes new policy resulting from enactment of Amended Substitute House Bill 49 of the 132<sup>nd</sup> General Assembly. A brief summary of each rule's content, and changes included in the proposed amendment are described below:

#### **OAC 5160-45-07**

This rule sets forth the process and requirements for the criminal records checks of employees of, and persons under final consideration for employment with, agencies that provide HCBS to individuals enrolled in ODM-administered waiver programs. Proposed changes include the addition of the definition of RAPBACK, and language affirming that if a waiver agency enrolls an employee in RAPBACK, the criminal records check requirements of the rule are considered to have been met for that employee. The proposed changes also include the addition of the Medicare exclusion database if the waiver agency is using ODM's automated registry check system (ARCS), and the Ohio Medicaid Provider Exclusion and Suspension list, to the list of exclusionary databases. Proposed changes also include updates to Revised Code and Administrative Code rule cites and commonly used terminology.

#### **OAC 5160-45-08**

This rule sets forth the process and requirements for the criminal records check requirements for independent providers of ODM-administered waiver program services. The rule is being amended to permit ODM to use the information contained in RAPBACK to meet the annual criminal record check requirements for independent providers. The RAPBACK opportunity is the result of Amended Substitute House Bill 49 of the 132<sup>nd</sup> General Assembly. Proposed changes also include updates to Revised Code and Administrative Code rule cites and commonly used terminology.

#### **OAC 5160-45-11**

This rule sets forth a tiered system of exclusionary periods for disqualifying offenses. The periods range from five years to permanent exclusion depending upon the type and number of offenses. The rule also sets forth policy regarding pardons under which certain individuals can obtain a 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 a Certificate of Achievement and Employability in an HCBS-related field, issued by the Ohio Department of Rehabilitation and Corrections pursuant to Section 2961.22 of the Revised Code. Proposed changes include updates to Administrative Code cites and commonly used terminology.

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

RC 5164.341, 5164.342, 5166.02

**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.**

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 the statutory requirements set forth in RC 109.572, 109.5721, 5164.341 and 5164.342 regarding criminal record checks. ODM assures the health and welfare of the individuals served in ODM-administered waiver programs. One way this is accomplished is by requiring providers to successfully pass criminal record checks.

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

Successful outcomes are measured through a finding of compliance with these standards. Additionally, the expectation is a reduction in the number of allegations of criminal activity on the part of HCBS waiver service providers.

**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.*

Stakeholder outreach occurred through the ODM HCBS Rules Workgroup. The drafts were shared with a list of more than 900 stakeholders, including individuals, agency and independent providers and advocates.

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

Stakeholders were generally supportive of the changes included in OAC rules 5160-45-07, 5160-45-08 and 5160-45-11.

**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?**

No scientific data was used to develop the rule changes or the measurable outcomes of the rule changes.

**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?**

ODM is required to implement RC 109.572, 109.5721, 5164.341 and 5164.342. Alternative regulations to these three rules were not considered. The rules reflect the current statutory requirements and the industry-approved exclusionary periods.

**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.*

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

**12. 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 pertaining to these specific criminal records check requirements. OAC rules 5160-45-07, 5160-45-08 and 5160-45-11 are the only rules applicable to ODM-administered waiver providers.

**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.**

At the time of provider compliance reviews and during investigations of alleged health and welfare violations, ODM shall examine the provider's records to ensure criminal records check requirements are being applied consistently and predictably as set forth in the regulations.

**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;**

For the purposes of these rules,

- “Waiver agency” means an entity that provides HCBS under an ODM-administered waiver program, other than such an entity that is certified under the medicare program. It does not include independent providers. It is estimated that more than 700 waiver agencies will be affected by these changes.
- “Independent provider” means a person who has a Medicaid provider agreement to provide HCBS as an independent provider in an ODM-administered waiver program. The term “independent provider” is interchangeable with the term “non-agency provider.” Approximately 6,000 independent providers will be affected by these rules.

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

Fees for BCI and FBI records checks; and additional administrative time necessary to conduct a database check, request the criminal records check and compile a personnel record.

**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.*

ODM asked the Ohio Council for Home Care and Hospice and LeadingAge Ohio to quantify the expected adverse impact waiver agencies might experience as a result of implementing OAC 5160-45-07. Their estimates/comments are attached and summarized below.

Estimated Adverse Impact to Waiver Agencies:

1. Administrative time conducting the seven database checks. OCHCH and LeadingAge Ohio note the proposed rule contains an additional database, which is not required by the Ohio Revised Code, and that it will increase administrative time for reviews. ODM notes that RC 5164.342(E) identifies six databases and also cites “Any other databases, if any, specified in rules authorized by this section.” The seventh database identified in the proposed rule, The Ohio Medicaid Provider Exclusion and Suspension List” found at: <http://medicaid.ohio.gov>, falls into this category.
2. Fee for BCI criminal records check for all applicants considered for employment is \$22.00, which may vary from county to county.
3. Fee for criminal records check from the FBI for each applicant considered for employment, who has not resided in Ohio for five years is \$24.00, which may vary from county to county. BCI accepts and processes FBI background checks.

4. Time spent requesting a criminal records check, logging information on a roster, and compiling personnel records:

The administrative time and cost for conducting the seven database reviews is estimated to be \$24/hour. The reviews would take approximately 30 minutes per applicant/employee.

The total average cost per applicant/employee to an agency would be \$100, which also includes administrative cost, employee wages (different pay rates among aides, RNs, LPNs and therapists), employee overtime, travel, BCI fee and FBI fee.

Based upon these assumptions, OCHCH and LeadingAge Ohio estimate that on an annual basis, an agency will spend approximately \$1,432 depending on the number of direct care workers per agency. Independent providers will be responsible for the costs associated with their initial background checks. This is consistent with current practice. Thereafter, ODM will pay the independent provider's annual \$5 RAPBACK fee.

#### Estimated Adverse Impact to Independent Providers

Independent providers will be responsible for the costs associated with their own background checks. This is consistent with current statute and practice. The current fee for a BCI criminal records check for all applicants considered for employment is \$22.00, which may vary from county to county.

The current fee for a criminal records check from the Federal Bureau of Investigation for each applicant considered for employment who has not resided in Ohio for five years is \$24.00, which may vary from county to county. BCI accepts and processes FBI background checks.

ODM will pay the provider's annual \$5.00 RAPBACK fee to BCI to participate, and an annual criminal background check will be unnecessary.

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

The criminal records check is a valuable tool for waiver agencies to use when making prudent employment decisions, and for individuals enrolled on an ODM-administered waiver program when selecting service providers. It helps to ensure the safety and protection of individuals receiving waiver services.

## **Regulatory Flexibility**

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

No, the criminal records check requirements are established by statute and may not be waived for any individual employed to provide HCBS in an ODM-administered waiver.

**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?**

The waiver of penalties and fines for first-time paperwork offenses set forth in Section 119.14 of the Ohio Revised Code will not be applied to the substantive statutory requirement for criminal records checks established in sections 5164.341 and 5164.342 of the Revised Code.

The requirement for a criminal records check by a waiver agency does not involve the direct collection of information or paperwork by ODM or another regulatory body; the waiver agency is required to obtain and maintain a criminal records check for each applicant considered for employment involving providing direct care and each employee who provides direct care to an individual.

Failure to conduct a criminal records check on applicants for employment represents a significant potential for serious harm to health and welfare of individuals and the public interest. As authorized by the applicable state laws and rules governing the specific waiver agency, ODM may take appropriate action against an HCBS provider that violates the requirements of these rules and sections 5164.341 or 5164.342, as appropriate, of the Revised Code.

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

The agency maintains program staff who can assist and provide guidance or technical assistance to waiver agencies and independent providers to maintain compliance through the:

Ohio Department of Medicaid  
Bureau of Network Management  
[BureauNetworkManagement@medicaid.ohio.gov](mailto:BureauNetworkManagement@medicaid.ohio.gov)  
(800) 686-1516

Criminal records checks are obtained through BCI. Assistance may be received through the Office of the Attorney General:

<http://www.ohioattorneygeneral.gov/Business/Services-for-Business/Webcheck>

**Attachment**  
**Ohio Council for Home Care & Hospice and LeadingAge Ohio's**  
**Comments for the BIA**  
**ODM rule 5160-45-07 ODM-administered waiver programs:**  
**Criminal records checks involving agency providers.**

**September 29, 2017**

Thank you for the opportunity to submit a Business Impact Analysis (BIA) for the proposed changes to rule 5160-45-07 ODM-administered waiver programs: criminal records checks involving agency providers.

**Adverse Impact to Business**

- 1) There will be increased administrative time conducting the **seven** database checks. The proposed rule contains an additional database, which is not required by the Ohio Revised Code, but will increase the administrative time for reviews.
- 2) Fee for the Bureau of Criminal Investigation and Identification (BCI) criminal records check for all applicants/employees is \$22.00, which may vary county to county.
- 3) Fee for criminal records check from the Federal Bureau of Investigation (FBI) for each applicant/employee, who has not resided in Ohio for five years is \$24.00, which may vary county to county. BCI accepts and processes FBI background checks.
- 4) Time spent requesting a criminal records check, logging information on a roster, and compiling personnel records includes:
  - The administrative time and cost for conducting the seven databases review is estimated to be \$24 per hour;
  - The reviews would take approximately 30 minutes per applicant/employee at a cost of \$12 administrative time per applicant/employee;
  - The total average cost per applicant/employee to an agency would be \$100, which also includes administrative cost, employee wages (different pay rates among aides, RNs, LPNs, and therapists), employee overtime, travel, BCII fee, and FBI fee;
  - Based on all the assumptions OCHCH and LeadingAge Ohio estimate that on an annual bases an agency will spend approximately \$1,432 depending on the number of direct care workers per agency.

Please see the **Attachment** for the details.

If you have questions please contact Beth Foster, Director of Regulatory Affairs at Ohio Council for Home Care & Hospice ([beth@ochch.org](mailto:beth@ochch.org)) and Anne Shelley, Director of Professional Development & HH/Hospice Regulatory Relations at LeadingAge Ohio ([ashelley@leadingageohio.org](mailto:ashelley@leadingageohio.org))

## Attachment (cont.)

Cost Analysis for 5 Year Required Background Check Rule-Effective January 1, 2013 (This is update for the 5 year rule review.)

### Agreed Upon Costs

Number of direct care staff employed for 5+ years:	93,050
Average cost per direct care worker:	\$ 100
Total statewide cost of proposed rules for next five years:	\$ 9,305,000
Average statewide cost in subsequent years:	\$ 1,861,000
Average cost per certified agency in subsequent years:	\$ 1,431.54

### Notes and Assumptions:

Original background checks cost analysis was completed in August 2012 & revised in Sept. 2017.

This analysis represents a conservative estimate partially based on data provided by home health agencies.

Total number of direct care staff is 93,050 and is based on 2014 US Bureau of Labor Statistics for the number of jobs created by home health.

Direct care staff does not include office personnel.

Average cost includes administrative, employee wage, employee overtime, travel, BCII fee, and FBI fee .

Average cost encompasses different pay scales among aides, RNs, LPNs, and therapists.

Analysis assumes more than 1300 home health agencies, 772 of which are Medicare certified as of 06/30/17.

The analysis assumes no distinction between Medicare certified/ODA certified/DODD certified/accreditation/or private pay private duty home health agencies.

RAPBack program not included in rule so therefore not included in this information.

Only available update since 2012 is number of Medicare Certified HHAs, and 2014 US Bureau of Labor Statistics.

Prepared by OCHCH and LeadingAge Ohio

9/29/2017

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