



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Joseph Baker, Director

MEMORANDUM

TO: Tom Simmons, Ohio Department of Aging

FROM: Michael Bender, Business Advocate

DATE: July 18, 2023

RE: **CSI Review – Background Checks for Paid Direct-Care Positions (OAC 173-9-01, 173-9-02, 173-9-03, 173-9-03.1, 173-9-04, 173-9-04.1, 173-9-05, 173-9-06, 173-9-07, 173-9-07.1, 173-9-08, 173-9-09, and 173-9-10)**

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Department as provided for in ORC 107.54.

Analysis

This rule package consists of six new rules, two amended rules, and eleven rescinded rules proposed by the Ohio Department of Aging (Department) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on June 29, 2023, and the public comment period was held open through July 13, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on June 29, 2023.

Ohio Administrative Code (OAC) 173-9-01 specifies definitions pertaining to criminal background checks for applicants and employees in paid direct-care positions, specifically that that provide services to consumers enrolled in Department-administered programs other than the Assisted Living Program. The rule is amended to update language and definitions, add a term, remove a term, and eliminate unnecessary language. OAC 173-9-02 is rescinded and replaced by a new rule with the same number to list only the positions to which the chapter does not apply, add citations, no longer indicate that a position which involved providing legal services is exempt, and eliminate provisions regarding implied factors and chief administrators. OAC 173-9-02, the proposed new rule, sets forth the applicability of the chapter. OAC 173-9-03 and 173-9-03.1 are rescinded and replaced by new

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rule OAC 173-9-03 to give agency providers the flexibility to conduct database reviews on the same day as a criminal records check rather than before, clarify that a responsible party may use the automated registry check system to review all databases at the same time and on a continual basis, and update citations. OAC 173-9-03, the proposed new rule, provides for the required database review conducted by a responsible party to find any disqualifying status of an applicant, employee, or self-employed provider with respect to a paid direct-care position.

OAC 173-9-04 and 173-9-04.1 are rescinded and replaced by new rule OAC 173-9-04 which adds citations and relocates the standards for whom to check and deadlines for criminal checks to the newly created appendices. OAC 173-9-04, the proposed new rule, provides for the criminal records check conducted by a responsible party on applicants, employees, and self-employed providers with respect to a paid direct-care position. Two new appendices referenced in the rule are also provided and outline the standards for whom to check and the deadlines for criminal checks. OAC 173-9-05 is rescinded and replaced by a new rule with the same number to add a citation and clarify the limited applicability of the provisions. OAC 173-9-05, the proposed new rule, establishes the standards for the conditional hiring of an applicant for a paid direct-care position. OAC 173-9-06 lists the disqualifying offenses for a paid direct-care position in a Department-administered program. The rule is amended to update language and the cited ORC section names, clarify that being found eligible for intervention in lieu of conviction to a disqualifying offense is a disqualifying offense, add the offense of unlawful performance of a drug-induced abortion, and remove the offense of illegal use or possession of marijuana drug paraphernalia.

OAC 173-9-07 and 173-9-07.1 are rescinded and replaced by new rule OAC 173-9-07 to update the rule title and cited ORC section names, delineate responsibilities by the type of responsible party, clarify that being found eligible for intervention in lieu of conviction to a disqualifying offense is a disqualifying offense, add the offense of unlawful performance of a drug-induced abortion, and remove the offense of illegal use or possession of marijuana drug paraphernalia. OAC 173-9-07, the proposed new rule, establishes the occasions in which an applicant employee, or self-employed provider may obtain or retain a paid direct-care position despite having a disqualifying offense on record. OAC 173-9-08 is rescinded and replaced by a new rule with the same number to add citations and replace the requirement for a responsible party to maintain a roster of applicants and employees with a requirement to maintain this roster only for applicants and employees who are required to obtain criminal records from the Federal Bureau of Investigation (FBI) through the Bureau of Criminal Identification and Investigation (BCII). OAC 173-9-08, the proposed new rule, provides for the confidentiality and retention of criminal records by a responsible party. OAC 173-9-09 and 173-9-10, which contain immunity provisions and citations to other rules and statutes that establish disciplinary actions for noncompliance, are rescinded without replacement as the Department deems them duplicative and unnecessary.

During early stakeholder outreach, the Department reached out to various stakeholders for input on the rules, making attempts on July 12, 2021, September 28, 2021, and May 17, 2022. The stakeholders contacted included the Academy of Senior Health Sciences, Inc., Catholic Social Services of the Miami Valley, LeadingAge Ohio, the Ohio Association of Area Agencies on Aging, the Ohio Assisted Living Association, the Ohio Association of Medical Equipment Suppliers, the Ohio Association of Senior Centers, the Ohio Health Care Association, the Ohio Council for Home Care and Hospice, Ohio Jewish Communities, and the State Long-Term Care Ombudsmen. From January 27, 2023, through February 6, 2023, the Department also conducted interviews with three human resources professionals who conduct database reviews and criminal records checks, a rural provider in southeastern Ohio, a suburban provider in northwest Ohio, and an urban provider in southwest Ohio. Additionally, the Department conducted a public comment period in March 2023 for the renewal application with the Centers for Medicare & Medicaid Services for a Medicaid waiver to authorize the PASSPORT Program. Many stakeholders urged the Department to decrease the number of databases required to be checked. The Department replied that Ohio law requires the checking of that many databases to protect consumers from abuse, neglect, and exploitation but recommended that providers use the Automated Registry Check System (ARCS) because it checks all databases at once. Other suggestions were denied due to conflicts with Ohio law, although the Department did provide answers to questions for clarification and incorporated feedback into the rules requesting citation updates and that responsible parties only maintain a roster for applicants and employees who require the obtainment of criminal records from the FBI through BCII. During the CSI public comment period, the Department received one comment from Area Agency on Aging 7 (AAA7). AAA7 asked several questions for clarification regarding the use of ARCS, payments for criminal records checks, and electronic fingerprint scanning which were answered by the Department. The Department also revised the rules to make a technical correction.

The business community impacted by the rules includes applicants, employees, and self-employed providers in paid direct-care positions serving consumers through Department-sponsored programs as well as responsible parties that hire for such positions. These may include area agencies on aging, the PASSPORT administrative agency, providers, subcontractors, and consumers. The adverse impacts created by the rules include reviewing databases, checking criminal records, and possible disqualification from a paid direct-care position. According to the Department, the State offers ARCS to responsible parties free of charge. However, there are fees for checking criminal records with BCII and the FBI, the amount of which depends on the location used. The Department estimates that it takes five minutes per applicant/employee for a responsible party to manually review all seven required databases, while ARCS automatically reviews the seven databases on a daily basis to see if an employee's status is disqualifying. The Department also estimates an applicant or employee would spend about an hour obtaining criminal records if sent to a BCII WebCheck location. The Department notes a responsible party may enroll in Rapback for five dollars per employee per year to check criminal records on a daily basis. The Department does point out that the regulatory burden of the

rules will be reduced as the revisions remove the offense of illegal use or possession of marijuana drug paraphernalia as a disqualifying offense, no longer require providers subject to Ohio's new home health licensure requirements to be subject to the rules, give agency providers flexibility to conduct database reviews on the same day as a criminal records check rather than before, and replace the requirement for a responsible party to maintain a roster of applicants and employees with a requirement to maintain this roster only for applicants and employees required to obtain criminal records from the FBI through BCII. The Department states that the adverse impacts to business are justified to implement state and federal requirements and ensure the health and safety of individuals enrolled in Department-administered programs.

Recommendations

Based on the information above, the CSI Office has no recommendations on this rule package.

Conclusion

The CSI Office concludes that the Department should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.