



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

**Joseph Baker**, Director

### Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Health

Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

Chapter 3701-61 Nursing Home Residents' Rights on Transfer or Discharge

Rule Number(s): 3701-61-01 to 3701-61-08

Date of Submission for CSI Review: 2/28/2023

Public Comment Period End Date: 3/30/2023

Rule Type/Number of Rules:

New/ 1 rules

No Change/      rules (FYR?     )

Amended/ 6 rules (FYR? X  )

Rescinded/ 2 rules (FYR? X  )

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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### **Reason for Submission**

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

**Which adverse impact(s) to businesses has the agency determined the rule(s) create?**

**The rule(s):**

- a. ☐ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**
- b. ☒ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**
- c. ☒ **Requires specific expenditures or the report of information as a condition of compliance.**
- d. ☐ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

### **Regulatory Intent**

2. **Please briefly describe the draft regulation in plain language.**

These rules set forth the procedures for facility-initiated transfer or discharge of a resident from a nursing home or residential care facility. This includes the provision of notice of a proposed transfer/discharge, as well as the resident's right to challenge the proposed transfer/discharge, including the request for a hearing before a hearing officer. These rules also set forth the "bed hold" policies for both Medicaid and private pay residents who are transferred to a hospital or for therapeutic leave. This bed hold policy gives a resident notice of the number of days that the resident has to resume residency at the facility.

Revised:

3701-61-01: This rule establishes definitions for commonly used words and phrases in Chapter 3701-61. Revisions have been made to clarify what constitutes a room change and that the movement of a resident to another part of a facility constitutes a resident transfer for purposes of the Chapter.

3701-61-02: This rule establishes the right of a resident to challenge a proposed transfer or discharge by requesting an impartial hearing. Revisions have been made to clarify that if a resident has an application for Medicaid that is still under appeal or review, that the resident may not be transferred until the appeal or application have a decision rendered. Restrictive terms have been removed in accordance with SB 9.

3701-61-03: This rule establishes requirements to be included when proposing to transfer or discharge a resident from a home, including reason(s) for the proposed transfer or discharge, the proposed date, and the location where the resident will be discharged. The rule also establishes some hearing rights of the resident. Revisions have been made to remove restrictive terms in accordance with SB9, to require the submission of multiple forms of contact for the home with the discharge notice, and to improve the readability of the rule.

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3701-61-04: The rule establishes the hearing requirements the Department of Health must meet when a resident challenges a proposed transfer or discharge, as well as establishing appeal rights for residents who receive an unfavorable decision from the hearing officer. Revisions have been made to remove restrictive terms in accordance with SB9, to allow for email communication throughout the hearing process, and to improve the readability of the rule.

3701-61-05: The rule establishes the responsibilities of the home when transferring or discharging a resident, including preparing the resident for transfer or discharge, ensuring Medicaid residents receive notice of the Medicaid bed-hold policy, and that private-pay residents receive notice of the home's bed hold policy. "Bed hold" policies ensure a person can return to the home after being transferred or discharged for therapeutic reasons. Revisions have been made to remove restrictive terms in accordance with SB9 and to reorganize the language within the paragraphs to improve on readability.

3701-61-06: The rule establishes processes for the Department of Health to accept, respond to and investigate complaints for violating resident's enumerated rights, as well as hearing rights for a home found to have violated resident's rights, including appeals rights. Revisions have been made to remove restrictive terms in accordance with SB9 and to improve the readability of the rule.

New:

3701-61-07: Existing rule 3701-61-08 has been moved forward to replace existing rule 3701-61-07 due to its rescission. The rule establishes the responsibilities of a home to provide reasonable notice to a resident when proposing to move a resident from one room to another, including a reason for the proposed change. Revisions have been made to remove restrictive terms in accordance with SB9 and to improve the readability of the rule.

Rescind:

3701-61-07: The rule has been rescinded as the criminal records check requirements for adult day cares falls under the authority of the Ohio Department of Aging and the criminal records check requirements for nursing homes and residential care facilities are set forth in Chapter 3701-13 of the Ohio Administrative Code.

3701-61-08: Existing rule 3701-61-08 is being rescinded and moved forward to replace existing rule 3701-61-07 due to its rescission.

3. **Please list the Ohio statute(s) that authorize the agency, board, or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

3721.11

4. **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?**

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No. While the Centers for Medicare and Medicaid Services has regulations regarding resident transfer and discharge, in 42 C.F.R 483.12, Chapter 3701-61 applies to similar state statutory rights found in sections 3721.10 to 3721.18 of the Revised Code.

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

Not Applicable.

- 6. 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)?**

The Department of Health is required (ORC 3721.11) to set forth rules governing procedures to implement the transfer and discharge requirements set forth in ORC sections 3721.16, 3721.161, and 3721.162. This law and the rules adopted thereunder describe what conditions may lead to a facility initiated transfer or discharge. The rules set forth a process to ensure the resident and their sponsor that the transfer or discharge is not arbitrary and that any transfer or discharge is safe and orderly. Additionally, to ensure fairness, the facility is required to provide sufficient notice to the resident and their sponsor of the proposed discharge and of the resident's rights in relation to the proposed transfer/discharge, including the right to a hearing the telephone number of the state long term care ombudsman. Finally, the rules allow for a facility that admits residents to a portion of the facility with specialized rooms or equipment to provide notice upon admission to that unit of the facility's policy on room changes when the resident no longer require the specialized room or equipment.

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

Successful outcomes would be evidenced by compliance measured through a standard survey process approximately every fifteen months. Further evidence of success would be represented by the number of complaints regarding transfer and discharge of residents received and the number of validated complaint surveys.

- 8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

No

#### **Development of the Regulation**

- 9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

Provider organizations, other state agencies, and state hearing officers were asked to provide comments on the current rules and suggested amendments in January 2023. ODH received numerous comments from hearing officers and no comments from the industry. Stakeholders asked for comment include:

Leading Age Ohio

Ohio Academy of Senior Health Sciences

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Ohio Assisted Living Association  
Ohio Health Care Association  
Ohio Department of Aging  
Ohio Department of Medicaid  
State Long-Term Care Ombudsman

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

State hearing officers requested amendments to in-person hearing requirements and certified mail service that were not able to be incorporated due to the statutory nature of those two requirements. Suggestions from hearing officers resulted in clarifications on room changes and transfers, addressed denial of Medicaid applications by residents, and added additional contact information to what must be provided to the hearing officers.

**11. 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

**12. 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?**

Alternative regulations to the rules set forth in Chapter 3701-61 of the Administrative Code were not considered. The Ohio Department of Health is required to monitor compliance with the transfer and discharge standards mandated by section 3701.16, 3701.16.1, and 3701.16.2 of the Revised Code.

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

As part of the 5 year review, ODH reviews the rules of other agencies to determine if there is duplication.

**14. 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.**

Providers will be surveyed at least once every 15 months to determine compliance with this regulation. The survey will be done by health care facility program staff using a standard survey tool. This staff will have been trained in the survey process, including understanding of the regulation(s).

**Adverse Impact to Business**

**15. Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:**

**a. Identify the scope of the impacted business community, and**

As of February 21, 2023, in Ohio there are:

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939 licensed nursing homes; and  
796 licensed residential care facilities

**b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).**

A home that violates the transfer and discharge requirement could be subject to an ORC Chapter 119 hearing where a fine could be assessed. There are additional penalties associated with federally certified facilities, but such penalties are set by the Centers for Medicare and Medicaid Services, not ODH. Additionally, ODH may refer cases to the Attorney General if there is evidence of substantially less than adequate care at a home or substantially unsafe conditions in a home.

The highest cost of compliance is associated with preparing and providing notice to residents and resident sponsors. Compliance with this provision may require less than one hour of work by administrative personnel. Costs for implementation are between an average of \$18.13 to an average of \$29.75 per hour\*.

A facility that attends a hearing or appeal resulting from a proposed transfer or discharge may elect to employ an attorney at a cost of \$58.92 per hour\* for approximately five hours of work.

*\*United States Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages for the State of Ohio, May 2021, codes for Office and Administrative Support Occupations (43-0000), Healthcare Practitioner and Technical Occupations (29-0000) and Lawyers (23-1011). ODH is aware that attorneys in this field likely charge more than the average across all attorneys in Ohio, however, accurate information for attorneys specializing in this practice is difficult to deduce with any specificity.*

**16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. (*Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors*).**

The rules have been revised in numerous areas to improve the readability and provide clarification as to what information and documentation are necessary for hearings involving residents' rights.

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

Taken as a whole, these rules protect elderly and infirm Ohioans from arbitrary transfer and being transferred or discharged from what is now their home. The rules do allow for a home to transfer or discharge a resident without notice for any of nine reasons, including but not limited to, the home cannot meet the needs of the resident, the resident is not paying for the care provided, or if the resident is endangering the safety of others in the home.

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### **Regulatory Flexibility**

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

No, these rules are primarily statutory in nature within the administrative law arena and not subject to alternative means of compliance.

**19. 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's Regulatory Ombudsman has set forth a policy for ODH to follow regarding the waiver of fines and penalties for paperwork violations and first-time offenders. ODH implements this policy as part of its business process. Information regarding this policy can be found online at: <https://odh.ohio.gov/wps/portal/gov/odh/about-us/offices-bureaus-and-departments/Office-of-General-Counsel/Statement-on-Paperwork-Violations/>

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

ODH personnel are available by phone or email to assist anyone with questions. Additional guidance is posted to the following ODH webpages:

<https://odh.ohio.gov/know-our-programs/nursing-homes-facilities/nursinghomesfacilities>

<https://odh.ohio.gov/know-our-programs/residential-care-facilities-assisted-living/residentialcarefacilitiesassistedliving>