



# Common Sense Initiative

Mike DeWine, Governor  
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## Business Impact Analysis

Agency, Board, or Commission Name: **OHIO DEPT. OF AGING**

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

### ODA PROVIDER CERTIFICATION: STRUCTURED FAMILY CAREGIVING

Chapter 173-39 of the Administrative Code establishes the requirements to become, and to remain, an ODA-certified provider.

Rule Number(s): 173-39-02.25.

Date of Submission for CSI Review: March 19, 2024.

Public Comment Period End Date: April 2, 2024 at 11:59PM.

#### Rule Type/Number of Rules:

☒ New/ 1 rules

☐ No Change/ 0 rules (FYR? ☐)

☐ Amended/ 0 rules (FYR? ☐)

☐ Rescinded/ 0 rules (FYR? ☐)

The Common Sense Initiative is established in RC 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.

#### Reason for Submission

1. RC 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 RC 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?

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**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.**

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

ODA proposes to adopt new rule 173-39-02.25 of the Administrative Code. The proposed new rule will establish the specific requirements to become, and to remain, an ODA-certified provider of structured family caregiving. Similar to other rules in Chapter 173-39 of the Administrative Code (e.g., rule 173-39-02.24 of the Administrative Code), this new rule will refer to service-specific requirements in a rule adopted by the Ohio Department of Medicaid (ODM), which ODA is proposing to adopt new rule 5160-44-33 of the Administrative Code to establish these requirements.

**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.**

RC §§ [121.07](#), [173.01](#), [173.02](#), [173.39](#), [173.391](#), [173.52](#), [173.522](#).

**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?**

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

In order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application for a Medicaid waiver authorizing the state to launch and maintain the Medicaid-funded component of the PASSPORT Program, [42 CFR 441.352](#) requires ODA to establish provider-certification requirements to safeguard the health and welfare of individuals who receive services through the program.

**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.**

This proposed new rule will exist to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rules to establish requirements for provider certification and the PASSPORT Program.

**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)?**

This proposed new rule will exist to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rules to establish requirements for provider certification and the PASSPORT Program.

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

ODA and its designees monitor providers to ensure compliance for the continued health and safety of individuals receiving services from ODA-certified providers. [173-39-04] ODA will judge the adoption of this proposed new rule to be a success when ODA and its designees find few violations against it during structural compliance reviews or investigations of alleged incidents.

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

*If yes, please specify the rule number(s), the specific RC section requiring this submission, and a detailed explanation.*

No.

**Development of the Regulation**

**9. 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.*

On March 4, 2024, ODA emailed the following stakeholders to explain that ODA and ODM propose to offer a new service called *structured family caregiving* that will pay a caregiver, who may or may not be a family member, to provide personal care to an individual while living with the individual, whether in the individual's home or the caregiver's home. ODA explained that ODA proposes to adopt a new rule numbered 173-39-02.25 of the Administrative Code, but to refer to the service-specific definitions and requirements in ODM's proposed new rule rather than have differing requirements or duplicative requirements in our rule, and asked the stakeholders for any recommendations for what to include, or not include, in the new rule.

- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- OhioAging (O4A).
- Ohio Assisted Living Association (OALA).
- Ohio Association of Senior Centers (OASC).
- Ohio Council for Home Care and Hospice (OCHCH).
- Ohio Health Care Association (OHCA).
- Ohio Jewish Communities.
- State Long-Term Care Ombudsman.

On March 6, 2023, ODA met with OCHCH at OCHCH's request to discuss this and other rule proposals.

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

In response to its March 4, 2024 email and March 6 meeting, ODA received 1 comment from 1 stakeholder on this proposed new rule. The table below presents the comment and ODA's response to the comment.

	Comment	ODA's Response
1	<p>While the rule will be helpful to those who want to have a family member as a caregiver (it was a flexibility during COVID), it also adds a challenging element to the family dynamic, and to ensuring that the person receiving the care is empowered to advocate their needs or to contact our office when the situation may NOT be working well (or neglect, abuse, exploitation). How can we ensure oversight if the individual or other family is reticent to contact case managers about the care-giver, if need arises?</p> <p>One option may be AAA case managers (PASSPORT or MyCare for example). Currently case managers are scheduled for visits or oversight for individuals receiving care within a tiered system (we believe this is the process, but are unsure if this is by rule or in the AAA agreement). We'd recommend the case managers should be at the highest tier for this structured caregiving due to the potential for conflict/reporting (as opposed to an outside agency provider).</p> <p>Perhaps this is overthinking a bit, since most family care givers can be expected to provide the best care; but a 'trust but verify' approach might balance challenging family dynamics (what if APS should be contacted, or financial exploitation is occurring?)</p> <p>Perhaps we can talk this through- for a better understanding of the specific services/care allowable. Is it all care including clinical, medications, dietary, etc.?</p> <p>State Long-Term Care Ombudsman</p>	<p>ODA's proposed new rule will require certified providers to comply with service-specific requirements in ODM's proposed new rule 5160-44-33 of the Administrative Code. We will share your comment with ODM for the development of that rule. We encourage you to participate in ODM's rule-development process.</p>
2	OALA indicated that it has no opposition to the proposed service-specific definition that ODA mentioned in its email.	Thank you.
3	OhioAging expressed its support for the forthcoming new service and their familiarity with the format of rules of this sort.	Thank you.

**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?**

ODA is not proposing to adopt this proposed new rule due to scientific data.

**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 may include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.***

[RC §173.391](#) requires ODA to adopt rules to establish requirements for ODA-certified providers. Additionally, federal rules require ODA to establish adequate requirements for providers to assure the health and safety of individuals enrolled in ODA-administered programs.

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

[RC §173.391](#) authorizes only ODA to develop standards for ODA-certified providers of services to individuals enrolled in ODA-administered programs.

**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.**

Before this proposed new rule takes effect, ODA will post it on ODA's website. ODA will also send an email to subscribers of our rule-notification service to feature it.

Through regular monitoring activities, ODA and its designees will monitor ODA-certified providers for compliance. [173-39-04]

**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**

Currently, no person or business is affected. After this rule takes effect, any provider that applies for ODA-certification to provide structured family caregiving will be impacted.

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

*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.*

The following are the adverse impacts of this proposed new rule:

- General requirements to become and to remain an ODA-certified provider. These include compliance with (1) requirements established in rule 173-39-02 of the Administrative Code (e.g., providing ODA with contact information), (2) requirements on topics (e.g., background checks) that are referenced in rule 173-39-02 of the Administrative Code, but established outside of that rule (e.g., RC §§ [173.38](#) and [173.381](#)), and (3) requirements on topics (e.g., records retention) that are established in rule 173-39-02 of the Administrative Code and also outside of that rule (e.g., [45 CFR 75.361](#)).
- Specific requirements unique to structured family caregiving, which ODM is simultaneously proposing to adopt in proposed new rule 5160-44-33 of the Administrative Code.

The amount the PASSPORT Program pay providers for a service is an all-inclusive rate. It's intended to cover the daily costs incurred in the service plus employee-related costs. The costs incurred as a result of this proposed new rule are likely calculated as part of a provider's operational budget—the cost of doing business and clerical jobs, such as retaining records and updating policies and procedures.

**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 adoption of this new rule will provide a new business opportunity for providers.

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

ODA is required to develop rules establishing requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered programs.

Providers voluntarily apply for ODA certification. Certification is not required to provide a service unless a provider wants a government program that requires certification to pay the provider. Compliance with this proposed new rule will be required only if a provider voluntarily chooses to participate in a program requiring certification, such as the PASSPORT Program.

**Regulatory Flexibility**

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

Because the primary purpose of this proposed new rule will be to ensure the health and safety of individuals enrolled in ODA-administered programs, this rule will treat all providers the same, regardless of their size.

**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?**

ODA's primary concern is the health and safety of individuals receiving services from ODA-certified providers. Whenever possible, ODA or its designees will treat administrative violations that do not involve health and safety as opportunities for improvement through warning notices and solicitation of corrective action.

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

ODA and its designees are available to help providers of all sizes with their questions. Any person may contact [Tom Simmons](#), ODA's policy development manager, with questions about this proposed new rule.