

## TO BE RESCINDED

173-9-01 **Criminal records check.**

(A) Introduction: This rule establishes the requirements and processes regarding a criminal records check for each employer required under section 173.394 of the Revised Code to conduct a check on any applicant for a paid direct-care position.

## (B) Definitions:

- (1) "Applicant" means a person who is under final consideration for paid employment in a full-time, part-time, or temporary position that involves providing direct care. "Applicant" does not include a person who seeks to provide direct care in a position as a volunteer without receiving, or expecting to receive, any form of remuneration other than reimbursement for actual expenses.
- (2) "BCII" means "the bureau of criminal identification and investigation" and includes the superintendent of BCII.
- (3) "Convicted of" also means "convicted of, or pled guilty to."
- (4) "Criminal records check" has the same meaning as in section 109.572 of the Revised Code.
- (5) "Direct care" means any in-person contact with one or more consumers who receive a community-based long-term care service or any access to a consumer's personal property or personal records. "Community-based long-term care service" has the same meaning as in section 173.14 of the Revised Code.
- (6) "Employer" means the chief administrator of an agency provider who has entered into a provider agreement under Chapters 173-3 or 173-4 of the Administrative Code; the chief administrator of an agency provider certified under Chapter 173-39 of the Administrative Code; a self-employed provider who has entered into a provider agreement under Chapters 173-3 or 173-4 of the Administrative Code; a non-agency provider who is certified under Chapter 173-39 of the Administrative Code; a consumer who is directing a consumer-directed individual provider or a consumer-directed personal care provider who has entered into a provider agreement under Chapters 173-3 or 173-4 of the Administrative Code or who is certified under Chapter 173-39 of the Administrative Code; or, an assisted living provider who is certified under Chapter 173-39 of the Administrative Code. As used in this paragraph, "chief administrator" means the individual in charge of the daily operation of an

agency provider or any employee of an agency whom the chief administrator has designated as the chief administrator's representative.

(7) "FBI" means "federal bureau of investigation."

(8) "ODA" means "the Ohio department of aging."

(C) In general:

(1) Each employer and each applicant: Each employer shall request that BCII conduct a criminal records check on each applicant. No employer shall hire an applicant who fails to complete a form(s) and fingerprint impression sheet under paragraph (C)(4) of this rule. No employer shall hire an applicant who was convicted of a disqualifying offense, except under the standards of paragraph (E) of this rule.

(2) Notification: The employer shall inform each applicant at the time of initial application that, if the applicant comes under final consideration for employment, he/she shall provide a set of fingerprint impressions for the employer to use when requesting a criminal records check.

(3) FBI: If an applicant does not provide the employer with evidence that he/she has been a resident of Ohio for the five-year period immediately preceding the date the employer requests the criminal records check, or if the applicant does not provide the employer with evidence that BCII has requested his/her criminal records from the FBI within that five-year period, the employer shall request that BCII obtain information from the FBI as part of the criminal records check. Even if an applicant does provide the employer with evidence that he/she has been a resident of Ohio for the five-year period, the employer may request that BCII obtain information from the FBI as part of the criminal records check.

(4) Forms and fingerprints: The employer shall:

(a) Provide each applicant with the form and fingerprint impression sheet required to conduct a criminal records check, which may be tangible, electronic (e.g., BCII's "WebCheck" program), or both tangible and electronic. If the employer requests that BCII include information from the FBI in the criminal records check report, the employer shall also provide the applicant with the form necessary to obtain the FBI's information; and,

- (b) Forward the completed form(s) and fingerprint impression sheet to BCII for processing.

(5) Fees:

- (a) The employer shall pay BCII the fee prescribed under division (C)(3) of section 109.572 of the Revised Code for each criminal records check.
  - (b) The employer may charge an applicant a fee so long as the fee does not exceed the amount the employer pays to BCII, but only if:
    - (i) The employer notified the applicant at the time of initial application of the amount of the fee and that, unless the fee was paid, the employer would not consider the applicant for employment; and,
    - (ii) The medical assistance program established under Chapter 5111. of the Revised Code does not reimburse the employer for the fee.
- (6) Employment-service exemption: The employer is not required to request a criminal records check of an applicant under paragraph (C)(1) of this rule if the applicant was referred to the employer by an employment service that refers applicants to employers to fill full-time, part-time, or temporary positions involving direct care and:
- (a) The employment service or the applicant provides the employer with a criminal records check report on the applicant that was conducted no more than one year before the applicant's referral and the criminal records check report demonstrates that the applicant was not convicted of a disqualifying offense; or, the report demonstrates that the applicant was convicted of a disqualifying offense, but the employer chooses to hire the applicant under paragraph (E) of this rule; or,
  - (b) The employment service or the applicant provides the employer with a letter from the employment service, that is on the employment service's letterhead, that is dated and signed by a supervisor or another designated official of the employment service, and that states that the employment service has requested a criminal records check on the applicant, that the requested criminal records check will include a determination of whether the applicant has been convicted of a disqualifying offense, that, as of the date set forth on the letter, the employment service had not received the criminal records check report, and that, when the employment service receives the report, it promptly

will send a copy of it to the employer. If the employer employs an applicant conditionally under this paragraph, it shall also comply with the requirements for conditional employment under paragraph (G) of this rule.

(D) Disqualifying offenses: No employer shall hire an applicant who was convicted of the following violations, except under the standards of paragraph (E) of this rule:

(1) A violation of section 2903.01 (aggravated murder), 2903.02 (murder), 2903.03 (voluntary manslaughter), 2903.04 (involuntary manslaughter), 2903.11 (felonious assault), 2903.12 (aggravated assault), 2903.13 (assault), 2903.16 (failing to provide for a functionally impaired person), 2903.21 (aggravated menacing), 2903.34 (patient abuse), 2905.01 (kidnapping), 2905.02 (abduction), 2905.11 (extortion), 2905.12 (coercion), 2907.02 (rape), 2907.03 (sexual battery), 2907.05 (gross sexual imposition), 2907.06 (sexual imposition), 2907.07 (importuning), 2907.08 (voyeurism), 2907.09 (public indecency), former section 2907.12 (felonious sexual penetration), 2907.25 (prostitution after positive HIV test), 2907.31 (disseminating matter harmful to juveniles), 2907.32 (pandering obscenity), 2907.321 (pandering obscenity involving a minor), 2907.322 (pandering sexually-oriented matter involving a minor), 2907.323 (illegal use of minor in nudity-oriented material or performance), 2911.01 (aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary), 2911.12 (burglary), 2911.13 (breaking and entering), 2913.02 (theft, aggravated theft, grand theft, grand theft of a motor vehicle), 2913.03 (unauthorized use of a vehicle), 2913.04 (unauthorized use of property, computer, cable, or telecommunications property or service), 2913.11 (passing bad checks), 2913.21 (misuse of credit cards), 2913.31 (forgery, forging identification cards, or selling/distributing forged identification cards), 2913.40 (medicaid fraud), 2913.43 (securing writings by deception), 2913.47 (insurance fraud), 2913.51 (receiving stolen property), 2919.25 (domestic violence), 2921.36 (illegal conveyance of weapons, drugs, or prohibited items onto grounds of detention facility or institution), 2923.12 (carrying concealed weapons), 2923.13 (having weapons while under disability), 2923.161 (improperly discharging firearm at or into habitation; school-related offenses), 2925.02 (corrupting another with drugs), 2925.03 (trafficking in drugs, aggravated trafficking in drugs), 2925.11 (aggravated possession of drugs, possession of drugs, possession of marihuana (unless a minor misdemeanor), possession of cocaine, possession of LSD, possession of heroin, possession of hashish), 2925.13 (permitting drug use), 2925.22 (deception to obtain a dangerous drug), 2925.23 (illegal processing of drug documents), or 3716.11 (placing harmful object in food or confection) of the Revised Code; or,

(2) A violation of an existing or former law of this state, any other state, or the

United States that is substantially equivalent to any violation described in paragraph (D)(1) of this rule.

(E) Personal character standards: If an applicant was convicted of a disqualifying offense, the employer may use paragraphs (E)(1) and (E)(2) of this rule to determine if it is permissible to hire the applicant:

(1) The employer shall not, under any circumstance, hire an applicant who was convicted of a disqualifying offense, if the offense was:

(a) A violation of section 2903.01 (aggravated murder), 2903.02 (murder), 2903.03 (voluntary manslaughter), 2903.34 (patient abuse or neglect), section 3716.11 of the Revised Code (adulteration of food), or a violation of an existing or former law of this state, any other state, or the United States, if the offense is substantially equivalent to any offense described in section 2903.01, 2903.02, 2903.03, 2903.34, or 3716.11 of the Revised Code;

(b) A sexually-oriented offense. "Sexually-oriented offense" means a violation of section 2907.02 (rape), 2907.03 (sexual battery), 2907.05 (gross sexual imposition), or 2907.12 of the Revised Code (felonious sexual penetration), regardless of the age of the victim; a violation of section 2905.01 (kidnapping) or 2905.02 of the Revised Code (abduction), if the victim was a minor; a violation of division (A)(1) or (A)(3) of section 2907.321 of the Revised Code (pandering obscenity involving a minor); a violation of division (A)(1) or (A)(3) of section 2907.322 of the Revised Code (pandering sexually-oriented matter involving a minor); a violation of division (A)(1) or (A)(2) of section 2907.323 of the Revised Code (illegal use of minor in nudity-oriented material or performance); section 2903.01 (aggravated murder), 2903.02 (murder), 2903.11 (felonious assault), or 2905.01 of the Revised Code (kidnapping), or of division (A) of section 2903.04 of the Revised Code (involuntary manslaughter), regardless of the age of the victim, if the purpose was to gratify the sexual needs or desires of the offender; a sexually-violent offense; or a violation of an existing or former law of this state, any other state, or the United States that is substantially equivalent to the any offense previously-listed in this paragraph. "Sexually-violent offense" means a violent sex offense, or a designated homicide, assault, or kidnapping offense for which the offender also was convicted of a sexual motivation specification. "Violent sex offense" means a violation of section 2907.02 (rape), 2907.03 (sexual battery), or 2907.12 of the Revised Code (felonious sexual penetration) or a felonious violation of an existing or former law of this state, any other state, or the United States that is substantially

equivalent to a violation of section 2907.02, 2907.03, or 2907.12 of the Revised Code. "Designated homicide, assault, or kidnapping offense" means a violation of section 2903.01 (aggravated murder), 2903.02 (murder), 2903.11 (felonious assault), or 2905.01 of the Revised Code (kidnapping) or a violation of division (A) of section 2903.04 of the Revised Code (involuntary manslaughter). "Sexual motivation" means a purpose to gratify the sexual needs or desires of the offender, as described in section 2971.01 of the Revised Code. "Sexual motivation specification" means a specification, as described in section 2941.147 of the Revised Code, that charges that a person charged with a designated homicide, assault, or kidnapping offense committed the offense with a sexual motivation;

- (c) A repeat theft-related offense. "Repeat theft-related offense" means a theft-related offense by a person who was previously convicted of a theft-related offense, or the combination of multiple theft-related offenses in separate criminal actions. "Theft-related offense" means a violation of section 2911.13 (breaking and entering), 2913.02 (theft, aggravated theft, grand theft, grand theft of a motor vehicle), 2913.03 (unauthorized use of a vehicle), 2913.04 (unauthorized use of property--computer, cable, or telecommunications property), 2913.11 (passing bad checks), 2913.21 (misuse of credit cards), 2913.31 (forgery; identification card offenses), 2913.40 (medicaid fraud), 2913.43 (securing writings by deception), 2913.47 (insurance fraud), or 2913.51 (recovering stolen property), or a violation of existing or former laws of this state, any other state, or the United States that are substantially equivalent to section 2911.13, 2913.02, 2913.03, 2913.04, 2913.11, 2913.21, 2913.40, 2913.43, 2913.47, or 2913.51 of the Revised Code. The employer shall consider multiple theft-related offenses as one offense if the offenses are connected with the same act or were committed at the same time;
- (d) A violent offense against an older adult or a person with a disability or a violent offense against any other person if the applicant has not been fully discharged for a period of at least five years from the criminal sentence resulting from the violent offense. "Criminal sentence" means imprisonment, intensive program prison, probation, compact probation, parole, compact parole, post-release control (PRC), transitional control, judicial release, treatment in lieu of conviction, or a community control sanction, as defined in rule 5120:1-5-01 of the Administrative Code. "Violent offense" means a violation of section 2903.01 (aggravated murder), 2903.02 (murder), 2903.03 (voluntary manslaughter), 2903.04 (involuntary manslaughter), 2903.11 (felonious assault), 2903.12 (aggravated assault), 2903.13 (assault), 2903.21 (aggravated menacing), 2905.01 (kidnapping), 2905.02 (abduction), 2905.11 (extortion),

2907.02 (rape), 2907.03 (sexual battery), 2907.12 (felonious sexual penetration), 2911.01 (aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary), 2911.12 (burglary), 2919.25 (domestic violence), or 2923.161 of the Revised Code (improperly discharging firearm at or into habitation; school-related offenses); a violation of an existing or former law of this state, any other state, or the United States that is substantially equivalent to section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.21, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2911.01, 2911.02, 2911.11, 2911.12, 2919.25, or 2923.161 of the Revised Code; or, a violation of another disqualifying offense that was committed purposely or knowingly, and involved physical harm to another person or a risk of serious physical harm to another person; or,

- (e) A repeat-violent offense. "Repeat-violent offense" means the subsequent offense by a person who was convicted of any violent offense. The employer shall consider two or more repeat-violent offenses as one offense if they are connected with the same act or were committed at the same time.
- (2) The employer may hire an applicant who was convicted of a disqualifying offense that is not listed under paragraph (E)(1) of this rule. To do so, the employer shall determine the likelihood that the applicant may commit another disqualifying offense by considering:
- (a) The extent to which the position being sought could provide the applicant with an opportunity to commit the same offense or a similar offense;
  - (b) The duties and responsibilities of the position being sought;
  - (c) The nature and seriousness of the offense;
  - (d) Whether or not the offense was a theft-related offense;
  - (e) Whether or not the offense was a violent offense;
  - (f) The applicant's age at the time of the offense;
  - (g) The degree to which the applicant participated in the offense; and,
  - (h) The age and ability of the victim, including whether the victim was an individual with physical disability or an older adult. The employer

should use greater caution in hiring an applicant whose victim was an older adult.

- (i) The time elapsed since the applicant was fully discharged from any criminal sentence;
  - (j) The applicant's effort to rehabilitate and the result of the effort;
  - (k) If a criminal proceeding is pending against the applicant;
  - (l) If the applicant was convicted of an offense that is not a disqualifying offense, but bears a direct and substantial relationship to the duties and responsibilities of the position being filled; and,
  - (m) Any other factor that is relevant to the performance of the job duties.
- (3) It is the duty of an applicant who was convicted of a disqualifying offense to provide sufficient evidence that he/she meets the personal character standards under paragraph (E)(2) of this rule. If the applicant fails to do so, or if the employer determines that the applicant's evidence is insufficient, the employer shall not hire the applicant for a position in which the applicant would provide direct care.
- (F) Pardons: An employer may hire an applicant who was convicted of a disqualifying offense if:
- (1) The applicant was granted an unconditional pardon for the offense under Chapter 2967. of the Revised Code or an existing or former law of this state, any other state, or the United States, if the law is substantially equivalent to Chapter 2967. of the Revised Code;
  - (2) The applicant was granted a conditional pardon for the offense under Chapter 2967. of the Revised Code or an existing or former law of this state, any other state, or the United States, if the law is substantially equivalent to Chapter 2967. of the Revised Code, and every condition under which the pardon was granted is now satisfied; or,
  - (3) The conviction or guilty plea has been set aside pursuant to law.
- (G) Conditional employment:



- (1) An employer may only hire an applicant before obtaining a criminal records check report if:
    - (a) The employer hires the applicant on a conditional basis;
    - (b) The employer initiates the process of obtaining a criminal records check no later than five business days after the applicant begins conditional employment; and,
    - (c) The applicant provides the employer with a completed fingerprint impression sheet before the commencement of the applicant's conditional employment.
  - (2) The employer shall terminate the applicant's conditional employment if:
    - (a) The employer does not receive a criminal records check report from BCII in fewer than sixty days after the employer requested it from BCII; or,
    - (b) The employer received the criminal records check report in fewer than sixty days and it indicates that the applicant was convicted of a disqualifying offense, unless the employer chooses to hire the applicant under paragraph (E) of this rule.
  - (3) If the conditionally-hired applicant deceived the employer about the facts regarding his/her criminal records, the termination of the applicant's conditional employment is just cause for discharge under division (D)(2) of section 4141.29 of the Revised Code.
- (H) Records: In a file separate from personnel records, the employer shall maintain an applicant log on each applicant that contains:
- (1) The applicant's name;
  - (2) The applicant's application date;
  - (3) The applicant's first date of employment;
  - (4) The date the employer requested the criminal records check on the applicant;
  - (5) Whether the employer requested FBI information as part of the criminal records

check;

- (6) The date the employer received the criminal records check report;
  - (7) Any disqualifying offense listed on the criminal records check report and the date of that offense;
  - (8) The number of references the employer received on behalf of the applicant, the dates the employer received the references, and how the employer verified the references;
  - (9) Whether the applicant was conditionally hired, hired, terminated, or any combination of the three; and,
  - (10) Verification that the employer considered each and every personal character standard under paragraph (E)(2) of this rule if the employer hired an applicant whose criminal records check report revealed that the applicant was convicted of a disqualifying offense.
- (I) Confidentiality: A criminal records check report is not a public record for the purposes of section 149.43 of the Revised Code and the employer shall not make a report available to any person other than:
- (1) Himself/herself;
  - (2) The applicant who is the subject of the criminal records check or the applicant's representative;
  - (3) Another chief administrator or chief administrator's designee whose facility or program provides direct care and is owned or operated by the same entity as the employer;
  - (4) A court hearing officer or other necessary person involved in a case, regarding a denial to hire the applicant; or,
  - (5) The monitoring staff of ODA, an area agency on aging, or a PASSPORT administrative agency who, through this rule, are hereby authorized by ODA's director to monitor an employer for compliance to this rule.
- (J) Penalties: ODA may take appropriate action against an employer who violates this rule, including terminating the employer's provider agreement under Chapters

173-3 or 173-4 of the Administrative Code or certification under Chapter 173-39 of the Administrative Code.

Effective: 01/01/2013

R.C. 119.032 review dates: 10/16/2012

CERTIFIED ELECTRONICALLY

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Certification

12/21/2012

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Date

Promulgated Under: 119.03  
Statutory Authority: 173.01, 173.02, 173.391, 173.392, 173.394; Section 305(a)(1)(C) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006; 45 C.F.R. 1321.11 (10/01/2011 edition)  
Rule Amplifies: 173.391, 173.392, 173.394; 42 C.F.R. 460.68(a), 460.71(a)(1), and 460.71(a)(2) (10/01/2011 edition)  
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