

**Department of
Aging**

John Kasich, Governor
Bonnie Kantor-Burman, Director

NOTICE

The proposed rules implement H.B.487's amendments to sections 173.27 and 173.394 of the Revised Code, which regard **criminal record checks**. The Departments of Developmental Disabilities, Health, and Job and Family Services are also proposing similar rules in response to H.B.487.

ODA and Departments of Developmental Disabilities, Health, and Job and Family Services will conduct a joint public hearing to obtain comments concerning each state agency's rule proposals. The four agencies will conduct the hearing on **November 20, 2012** in the **Lobby Hearing Room** which is located just inside street-level entrance of the **Rhodes Tower** (30 E. Broad St.; Columbus, OH 43215). The hearing will begin at **10:00AM** and will continue until all parties in attendance at that time have had an opportunity to provide comment.

Any person may direct written comments or requests for information concerning ODA's rule proposals to Tom Simmons, ODA's policy manager, on or before the date of the hearing by writing to rules@age.ohio.gov.

DETAILS for ODA's RULE PROPOSALS

- **Introduction: ODA's rule proposals are part of a larger, multi-agency project that has multiple goals:**
 - On December 21, 2011, Attorney General Mike DeWine wrote the following to ODA and other state agencies: "[I]t is paramount to the safety of ... vulnerable citizens that we prohibit certain types of criminals from entering into patients' homes." He also said, "I urge you to work together to create one set of comprehensive rules in a manner that eliminates loopholes and provides full protection to Ohio's most vulnerable citizens." In Greg Moody's response, he said, "These efforts will align with broader OHT initiatives to assure the safety and quality of home and community based services that are critical to health transformation in Ohio." In response, the Ohio General Assembly enacted, in H.B.487 (129th G.A.), amendments to sections 173.27 and 173.394 of the Revised Code to *require* ODA to adopt rules to implement the sections.
 - Section 751.31 of H.B.487 required ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services to "[m]ake the policies established by the rules as similar as possible." Thus, one of the goals of this project is for the four state agencies to adopt rules similar to one another.

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Because many providers furnish services for more than one, if not all four, state agencies' programs, this would not only provide the same level of protection to the consumers of each state agency's programs, but also reduce the administrative burden that providers face when working with multiple state agencies. The intent is as follows: For all programs affected by this rule project, if a provider complies with one state agency's rules, the provider has complied with the other three state agencies' rules, too.

- H.B.487 either required or authorized the four state agencies to adopt changes into the criminal records check rules, including:
 - The proposed new rules would continue to require applicants under final consideration for employment to undergo criminal records checks. With certain exemptions, the new rules would also require criminal records checks on the employees after they are hired.
 - The list of disqualifying offenses increased for three of the four state agencies. For ODA's programs, the list of disqualifying offenses increased from 55 to 129.
 - As a replacement to the subjective "personal character standards" found in the current versions of each state agency's rules, this proposed new rules lists each disqualifying offense found into one of five tiers. The tiers determine how long a person with a conviction for each offense is barred from providing ombudsman services or direct care.
 - The rules explain that the certificates created under H.B.86 (129th G.A.) and S.B.337 (129th G.A.) may allow, under certain circumstances, for an applicant or employee to provide services under our programs even if the applicant or employee has a disqualifying criminal record.
 - The rules require checking free databases that may also indicate an applicant or employee is disqualified before paying for a criminal records check on the same applicant or employee.
- H.B.487's amendments to sections 173.27 and 173.394 of the Revised Code considerably lengthened the amount of material to cover in rules on criminal records checks. To make the rules easier to follow, ODA is proposing to:
 - Break what would have been a giant rule into smaller, one-topic rules.
 - Make the title of each rule the topic of the rule.
 - Arrange the rule topics in an order that is comparable to the Dept. of Health's proposed new rules. This would make proposed new rule 173-9-01 of the Administrative Code comparable to proposed new rule 3701-60-

01 of the Administrative Code, proposed new rule 173-9-05 of the Administrative Code comparable to proposed new rule 3701-60-05 of the Administrative Code, and so on.

- ODA is proposing to no longer duplicate the rule(s) for the ombudsman program. Instead, ODA now calls the entity responsible for conducting the check the “responsible entity” instead of the employer or the state long-term care ombudsman. The term “responsible entity” is a universal term that ODA uses throughout the proposed new rules. It applies to the ombudsman program and also various types of direct-care providers (*e.g.*, agencies, self-employed, consumer-directed). For comparison, section 5123.081 of the Revised Code uses the term “responsible entity” and a universal term that applies to the many responsible entities for the Dept. of Developmental Disabilities’ criminal records check requirements.
- **New Chapter 173-9 of the Administrative Code:**
 - **New Rule 173-9-01 Introduction and definitions:**
 - The rule introduces Chapter 173-9 of the Administrative Code and defines terms used in the chapter.
 - The definition of “direct care” remains unchanged from the definition in the current version of rule 173-9-01 of the Administrative Code.
 - ODA is proposing to define the terms “applicant,” “employee,” and “responsible entity” in a manner that makes it clear that the terms apply to ombudsman services and direct care.
 - “Minor drug possession” is a new term that previously only appeared in the comparable rules for the Depts. of Developmental Disabilities and Health. A person with a conviction for drug possession would be handled differently by proposed new rule 173-9-07 of the Administrative Code if the crime was a *minor* drug possession offense. (*i.e.*, Tier IV vs., Tier V)
 - “Disqualifying offense” is a term that ODA did not define in the current version of rule 173-9-01 of the Administrative Code. “Disqualifying offense” is an offense that would disqualify a person from providing ombudsman services or direct care. Before H.B.487, 55 disqualifying offenses were listed in sections 173.27 and 173.394 of the Revised Code. H.B.487 moved the list to section 109.572 of the Revised Code and increased the list of disqualifying offenses to 129. The new list of disqualifying offenses in section 109.572 of the Revised Code also applies to the comparable statutes and rules of the Depts. of Developmental Disabilities, Health, and Job and Family Services.

- “Chief administrator” is defined in a way that is useful for an agency provider *and* a non-agency provider. As a one-person business, each non-agency provider under the Choices and PASSPORT Programs and each self-employed provider under a non-Medicaid program is the chief administrator.
- “Waiver agency” is a new term that H.B.487 added to division (B) of section 173.394 of the Revised Code. See paragraph (B) of proposed new rule 173-9-02 of the Revised Code for the use of the term.

○ **New Rule 173-9-02 Applicability:**

- **Applicability:** In this proposed new rule, ODA lists the entities that are responsible to conduct the criminal records checks on applicants and employees for paid positions to provide ombudsman services or direct care.
- **Inapplicability:**
 - ODA expounds upon two exceptions to the requirements found in division (B) of section 173.394 of the Revised Code in order to close any apparent loopholes to enforcing the requirements that all applicants and employees for paid positions to provide direct care undergo criminal records checks. This should provide clarity for the many providers who provide an array of direct-care services. Also, the effort to homogenize the regulations between ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services, the status of an applicant or employee under one of the state agency’s rules vs., another agency’s rules should make no difference for a provider. Here is a breakdown:
 - If an employee works for an agency that provides Medicare-certified home health care, but the service the employee provides is not Medicare-certified home health care, but is direct care for an ODA-administered program, Chapter 173-9 of the Administrative Code applies to that employee. Thus, if an agency provides Medicare-certified home health care, home-delivered meals, and personal emergency response systems, the employees who provide home-delivered meals and personal emergency response systems are subject to Chapter 173-9 of the Administrative Code.
 - If an employee works for a waiver agency that provides Medicaid waiver services that the Dept. of Job and Family Services monitors, but the employee provides Medicaid waiver services or non-Medicaid services that the Dept. of

Job and Family Services does not monitor, Chapter 173-9 of the Administrative Code applies to that employee. This matters for providers of services that ODA monitors that the Dept. of Job and Family Services does not, such as assisted living, consumer-directed care, and congregate meals. It is also noteworthy that the Dept. of Job and Family Services' rule that would regulate a waiver agency (proposed new rule 5101:3-45-07 of the Administrative Code) says, "This rule does not apply to ... Applicants and employees of a waiver agency that is also a community-based long term care agency who are subject to database reviews and criminal records checks in accordance with section 173.394 of the Revised Code and the rules adopted thereunder."

- ODA also explains that (1) non-home and community-based elements of a PACE program, (2) a residential care facility that is not part of the Assisted Living Program, and (3) volunteers are not subject to the chapter.
- **New Rule 173-9-03 Free database reviews:** ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services are proposing to take the authority granted under sections 173.27, 173.394, and other sections of the Revised Code to require the responsible entities to check specified free databases before paying for a criminal records check. If the free databases reveal that an employee is disqualified from providing an ombudsman service or direct care, the responsible entity has no responsibility to conduct a criminal records check.
- **New Rule 173-9-04 General requirements:**
 - This proposed new rule contains the general requirements for conducting criminal records checks.
 - Many topics in this rule are similar to the requirements found in the current versions of rules 173-9-01 and 173-14-14 of the Administrative Code. These topics are the requirements to notify applicants, obtain fingerprints, check FBI records, and pay for the checks, as well as matters regarding using direct-care employees obtained through an employment service.
 - One new topic regards checking the criminal records of current employees and how often to check their records. Using the authority that H.B.487 granted to ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services, all four state agencies are proposing to adopt rules to require current employees to have their

criminal records checked and most state agencies will phase-in requirements to check those employees every five years based upon their anniversary dates of hire. Yet, current employees whose only direct care is (1) delivering home-delivered meals, (2) having access to consumer's personal information, or (3) providing a one-time-ever service are exempted from the requirement to have criminal records checks after they are hired or begin to furnish a service.

- In the proposed new rule, ODA also repeats language found in the current and new version of section 109.572 of the Revised Code that say a revalidation of the criminal records is another form of an official copy of the criminal records report.

- **New Rule 173-9-05 Conditional hiring:**

- This rule regulates conditional hiring. It contains the same criteria found in the current versions of rules 173-9-01 and 173-14-14 of the Administrative Code.
- H.B.487 and the proposed new rules for ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services allow for the same 60 days of conditional hiring. Before the passage of H.B.487, section 3701.881 of the Revised Code only the Dept. of Health to offer 30 days of conditional hiring.

- **New Rule 173-9-06 Disqualifying offenses:**

- This rule presents the lists of offenses that would disqualify an applicant or employee from providing ombudsman services or direct care.
- H.B.487 gave ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services identical lists of offenses.
- H.B.487 increased the list of disqualifying offenses for ODA's providers from 55 to 129.
- In response to *State v. Niesen-Pennycuff* (2012), ODA's proposed new rule does not list treatment in lieu of conviction (§2925.041) as a disqualifying offense.

- **New Rule 173-9-07 Disqualifying offense exclusionary periods; certificates; pardons:**

- In this proposed new rule, ODA sets forth the criteria for how a responsible entity may be able to hire certain applicants and retain certain employees for positions to provide ombudsman services or direct care

even if the applicant's or employee's criminal record lists a disqualifying offense.

- ODA and the Depts. of Developmental Disabilities, Health, and Job and Family Services are proposing to adopt identical criteria to the material in this proposed new rule.
- As a replacement to the subjective "personal character standards" found in the current versions of rules 173-9-01 and 173-14-14 of the Administrative Code, this proposed new rule lists each disqualifying offense found in proposed new rule 173-9-06 of the Administrative Code into one of five tiers. The tiers determine how long a person with a conviction for each offense is barred from providing ombudsman services or direct care.
 - Tier I offenses require a permanent bar.
 - Tier II offenses require a 10-year bar. If the person has multiple disqualifying offenses, of which at least one falls under Tier II, the person is barred for 15 years.
 - Tier III offenses require a 7-year bar. If the person has multiple disqualifying offenses, of which at least one falls under Tier III, the person is barred for 10 years.
 - Tier IV offenses require a 5-year bar. If the person has multiple disqualifying offenses, of which at least one falls under Tier IV, the person is barred for 7 years. A drug possession offense fits into this tier unless it is a *minor* drug possession offense.
 - Tier V offenses do not bar a person from employment. A *minor* drug possession offense fits into this tier.
- The proposed new rule incorporates the new Certificates of Qualification for Employment created by S.B.337 (129th G.A.). A common pleas court with competent jurisdiction may grant such a certificate to an applicant or employee to declare that an employer may employ the applicant or employee even if this rule would, otherwise, forbid the employment because the person has a criminal conviction that falls into Tiers II through IV.
- The proposed new rule incorporates the new Certificates of Achievement and Employability created by H.B.86 (129th G.A.). The Dept. of Rehabilitations and Corrections may grant such a certificate to an applicant or employee to declare that an employer may employ the applicant or employee even if this rule would, otherwise, forbid the

employment because the person has a criminal conviction that falls into Tiers II through IV.

- Just as in the current versions of rules 173-9-01 and 173-14-14 of the Administrative Code, the proposed new rule makes exceptions to disqualifications for those with pardons.
- **New Rule 173-9-08 Records:** This proposed new rule regards records, including confidentiality requirements and records-retention requirements. For responsible entities that provide direct care, the rule also requires the provider to maintain a roster instead of an applicant log. Because the provider is required to keep a copy of the criminal records report sealed in the personnel files (or in a separate file), and because statute authorizes ODA and the Departments of Developmental Disabilities, Health, and Job and Family Services access to those files to monitor for compliance, the four state agencies are proposing to no longer requiring providers to maintain applicant logs. The proposed new rosters would require the provider to retain much less information in a separate document than the logs.
- **New Rule 173-9-09 Immunity from negligent hiring:** This proposed new rule contains language on immunity from negligent hiring for responsible entities that follow the rules. The language is similar to language found in the current versions of rules 173-9-01 and 173-14-14 of the Administrative Code.
- **New Rule 173-9-10 Disciplinary actions:** This proposed new rule demonstrates that ODA may take action against responsible entities who provide direct care if they do not comply with Chapter 173-9 of the Administrative Code.
- **Current Rule 173-9-01 (for Rescission) Criminal records checks:** ODA is rescinding this longer, multi-topic rule to replace it with 10 shorter, 1-topic rules.
- **Rules Requiring Collateral Amendments:**
 - **New Rule 173-14-14 Staffing requirements and staff qualifications:** This proposed new rule contains language that is identical to the current rule on staffing requirements and staff qualifications except that the criminal records check language has been extracted from the rule. All criminal records check requirements in rules are now found in proposed new Chapter 173-9 of the Administrative Code.
 - **Current Rule 173-14-14 (for Rescission) Staffing requirements and staff qualifications:** ODA is proposing to rescind this rule. The lengthy language in the rule on criminal records checks has been amended and is now incorporated into Chapter 173-9 of the Administrative Code.

- **Amended Rule 173-3-06 Mandatory clauses:** ODA is amending paragraph (A)(17) of the rule to change references to Chapter 173-9 of the Administrative Code.
- **Amended Rule 173-39-02 Conditions of participation:** ODA is amending paragraphs (B)(4)(k), (C)(4)(d), (D)(4)(k), (E)(4)(g), and (F)(4)(k) of the rule to change references to Chapter 173-9 of the Administrative Code.
- **Amended Rule 173-39-05 Disciplinary actions:**
 - ODA is amending paragraphs (B)(2)(a)(ii) and (B)(3)(a)(iii) of the rule to change references to Chapter 173-9 of the Administrative Code.
 - ODA is also taking this opportunity to move the language from paragraph (C)(1)(b) of the rule to rule 173-9-05.1 of the Administrative Code.
 - ODA is proposing to add H.B.487's amended language in division (E)(2)(c) of section 173.394 of the Revised Code to paragraph (C)(1)(c) of the rule.
- **Amended Rule 173-39-05.1 Non-disciplinary actions resulting in certification revocation:** ODA is proposing to add the language it struck from paragraph (C)(1)(b) of rule 173-39-05 of the Administrative Code and also inserting "voluntarily" before "failed to enter into or renew a provider agreement."
- **Amended Rule 173-39-07 Appeal of denial of certification and proposed disciplinary actions:** ODA is proposing to amend this rule to use terminology that is consistent with Chapter 173-9 of the Administrative Code: "disciplinary action" (not "sanction") and "ODA" not "the department."
- **Amended Rule 173-40-06 Consumer choices and responsibilities:** ODA is amending paragraph (B)(1)(b)(iii) of the rule to change references to Chapter 173-9 of the Administrative Code.
- **Amended Rule 173-42-06 Consumer choices and responsibilities:** ODA is amending paragraph (B)(1)(b)(iii) of the rule to change references to Chapter 173-9 of the Administrative Code.