



Department of  
Aging

**Ted Strickland**, Governor  
**Barbara E. Riley**, Director

## NOTICE

ODA will conduct a public hearing to obtain comments concerning ODA's proposed adoption of new rules and amended rules regarding the **criminal records checks**, and ODA's proposed rescission of related rules that ODA is proposing to replace with the new rules, as required by section 119.03 of the Revised Code. ODA will conduct the hearing on **Wednesday, December 17, 2008** in Conference Room A of the Department's offices at 50 W. Broad Street, 9th floor; 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.

ODA is proposing to adopt new rule **173-9-01** of the Administrative Code to replace rule **173-41-01** of the Administrative Code, which ODA is simultaneously proposing for rescission.

There are two substantial changes in the proposed new rule regarding the personal character standards. Division (F) of section 173.394 of the Revised Code says, "The department of aging shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The rules shall specify circumstances under which a community-based long-term care agency may employ a person who has been convicted of or pleaded guilty to an offense listed or described in division (C)(1) of [section 173.394 of the Revised Code] but meets personal character standards set by the department." Therefore, ODA is required to adopt rules and is also responsible for "setting" the personal character standards. The two new substantial changes to the personal character standards are:

1. ODA is proposing to prohibit an employer from using personal character standards to hire an applicant who was convicted of repeat offenses of breaking and entering, theft, aggravated theft, grand theft, grand theft of a motor vehicle, unauthorized use of property--computer, cable, or telecommunications property, securing writings by deception, and recovering stolen property. The rule that ODA is proposing to replace (rule 173-41-01 of the Administrative Code) prohibits an employer from using personal character standards to hire an applicant who was convicted of repeat-theft offenses, but does not include theft nor the other previously-mentioned theft-related offenses in the definition of "repeat-theft offense."
2. ODA is proposing to prohibit an employer from using personal character standards to hire an applicant who was convicted of a violent offense against a person with a disability. The rule that ODA is proposing to replace (rule 173-41-01 of the Administrative Code) prohibits an employer from using the standards to hire an applicant who was convicted of a violent offense against an older person, but not a person with a disability.

ODA is also proposing a substantial change to the definition of "direct care." Section 173.394 of the Revised Code says that an employer is required to request from BCII a criminal records check on all applicants for direct-care positions, but does not define "direct care." ODA proposes to define "direct care" in the new rule to include having access to a consumer's personal property and personal records. The rule that ODA is proposing to replace (rule 173-41-01 of the Administrative Code) defines "direct care" as including access to a consumer's personal property, but not the consumer's personal records.

There are also non-substantial changes in the proposed new rule:

1. ODA is proposing to replace the term "community-based long-term care agency" with "employer." On June 30, 2006, Am. Sub. H. B. No. 530 (126th G.A.) enacted section 173.394 of the Revised Code, which requires each community-based long-term care agency to request a criminal records check from BCII on each applicant for a direct-care position. Before the passage of HB530, only PASSPORT's providers were required to request a

50 West Broad Street / 9<sup>th</sup> Floor  
Columbus, OH 43215-3363  
GoldenBuckeye.com

(614) 466-5500 Main  
(614) 466-5741 Fax  
(614) 466-6191 TTY

criminal records check from BCII on each applicant for a direct-care position.

Unfortunately, because HB530 called the provider responsible for requesting the check a "community-based long-term care agency," compliance with the law has not been optimal because non-PASSPORT providers generally associate the term with a certified agency provider of a PASSPORT service. Under section 173.39 of the Revised Code, the term "community-based long-term care agency" technically means any employer providing community-based long-term care services certified under section 173.391 of the Revised Code or non-certified under section 173.392 of the Revised Code and "agency" technically means "a person or government entity" under section 173.39 of the Revised Code, meaning that it applies to agency providers, non-agency providers, self-employed providers, consumers of consumer-directed individual providers, and operators of adult foster homes who employ caregivers.

Therefore, in the new rule, ODA is proposing to use the universal term "employer" instead of "community-based long-term care agency" so that the rule OBVIOUSLY requires each employer considering an applicant for a direct-care position to comply, not just TECHNICALLY requires each employer considering an applicant for a direct-care position to comply.

2. ODA is proposing to assign a rule number that is not sandwiched between rule numbers regarding the PASSPORT program to add clarity to the fact that this proposed new rule (and, for that matter, the current rule and section 173.394 of the Revised Code) requires all employers considering applicants for direct-care positions, not just employers who are PASSPORT providers considering applicants for direct-care positions, to perform BCII criminal records checks on the applicants. The current rule (rule 173-41-01 of the Administrative Code) appears between two PASSPORT rules.
3. ODA is proposing to simplify the introduction.
4. ODA is proposing to move the definitions of terms used in the personal character standards to the paragraphs on personal character standards to minimize cross-referencing in the rule.
5. ODA is proposing to add the name of each crime in parentheses after the section number of the Revised Code that prohibits the crime.
6. ODA is proposing to add outlining terms (e.g., "notification" and "FBI") to help readers identify the contents of certain paragraphs in order to make the rule easier to read, thereby increasing compliance.
7. ODA is proposing to consistently use "applicant" when referring to applicants because section 173.394 only pertains to applicants, and not to current employees. This should eliminate any confusion that the rule may require criminal records checks on current employees.
8. ODA is proposing to reduce verbosity, especially by eliminating excessive cross-referencing.

In this new rule, ODA is only proposing to make changes that the Ohio General Assembly has given ODA the authority to change. But, because most discussion surrounding criminal records checks regards changes that require new laws to be passed, it is worth mentioning that, unless authorized by a future law, ODA may not:

1. Require checks on current employees (once or on a recurrent basis), on owners, or on volunteers.
2. Disqualify a person who was convicted of a crime that division (A)(3) of section 109.572 of the Revised Code does not say disqualifies the person.
3. Disqualify a person who was convicted of a crime that appears in court records, other records, or the person's confession, but does not appear in the BCII's criminal records check report.
4. Give a person ownership/portability of the criminal records check report about him/her to reduce costs when, in a short period of time, a person applies for more than one job that requires a BCII criminal records check.
5. Allow ODA's director to designate other persons who may review a criminal records check report.
6. Explicitly state who pays for a criminal records check if the person being checked is a volunteer (if a future law requires an employer to check volunteers)
7. Exempt any employers who considering applicants for direct-care positions, nor exempt any of the applicants

being considered, from the requirements under section 173.394 of the Revised Code.

ODA is proposing to adopt new rule **173-14-14** of the Administrative Code to replace the current version of rule 173-14-14 of the Administrative Code, which ODA is simultaneously proposing for rescission.

There are two substantial changes in the proposed new rule regarding the personal character standards. Division (F) of section 173.27 of the Revised Code says, "The director of aging shall adopt rules in accordance with Chapter 119. of the Revised Code to implement [section 173.27 of the Revised Code]. The rules shall specify circumstances under which the office of the state long-term care ombudsperson program may employ a person who has been convicted of or pleaded guilty to an offense listed or described in division (C)(1) of [section 173.27 of the Revised Code] but meets personal character standards set by the director." Therefore, ODA is required to adopt rules and is also responsible for "setting" the personal character standards. In this proposed new rule, ODA is proposing two new substantial changes to the personal character standards, as follows:

1. ODA is proposing to prohibit the SLTCO or a regional ombudsman program from using personal character standards to hire an applicant who was convicted of repeat offenses of breaking and entering, theft, aggravated theft, grand theft, grand theft of a motor vehicle, unauthorized use of property--computer, cable, or telecommunications property, securing writings by deception, and recovering stolen property. The rule that ODA is proposing to replace (rule 173-14-14 of the Administrative Code) prohibits the SLTCO or a regional ombudsman program from using personal character standards to hire an applicant who was convicted of repeat-theft offenses, but does not include theft nor the other previously-mentioned theft-related offenses in the definition of "repeat-theft offense."
2. ODA is proposing to prohibit the SLTCO or a regional ombudsman program from using personal character standards to hire an applicant who was convicted of a violent offense against a person with a disability. The rule that ODA is proposing to replace (rule 173-14-14 of the Administrative Code) defined "offense of violence," but did not prohibit the SLTCO or a regional ombudsman program from using the standards to hire an applicant who was convicted of a violent offense against an older person or a person with a disability.

There are also non-substantial changes in the proposed new rule:

1. ODA is proposing to move the definitions of terms used in the personal character standards to the paragraphs on personal character standards to minimize cross-referencing in the rule. ODA is also moving other definitions to a paragraph at the end of the rule.
2. ODA is proposing to add outlining terms (e.g., "notification" and "FBI") to help readers identify the contents of certain paragraphs in order to make the rule easier to read, thereby increasing compliance.
3. ODA is proposing to reduce verbosity, especially by eliminating excessive cross-referencing.

In this new rule, ODA is only proposing to make changes that the Ohio General Assembly has given ODA the authority to change. But, because most discussion surrounding criminal records checks regards changes that require new laws to be passed, it is worth mentioning that, unless authorized by a future law, ODA may not:

1. Disqualify an applicant who was convicted of a crime that division (A)(3) of section 109.572 of the Revised Code does not say disqualifies the applicant.
2. Disqualify a person who was convicted of a crime that appears in court records, other records, or the person's confession, but does not appear in the BCII's criminal records check report.
3. Give a person ownership/portability of the criminal records check report about him/her to reduce costs when, in a short period of time, a person applies for more than one job that requires a BCII criminal records check.

ODA is proposing to amend rules **173-36-04.1** and **173-36-04.2** of the Administrative Code to change the references to rule 173-41-01 of the Administrative Code, which ODA is proposing for rescission, to proposed new rule 173-9-01 of the Administrative Code.

is proposing to amend rules **173-39-02** of the Administrative Code to change the references to rule 173-41-01 of the Administrative Code, which ODA is proposing for rescission, to proposed new rule 173-9-01 of the Administrative Code. ODA is also taking this opportunity to make the following other updates/changes in the rule:

1. Change references to the "criminal background check" were changed to "criminal records check."
2. Delete extra spaces throughout the rule in between words.
3. Improve the punctuation and conjunctions (e.g., "or") throughout the rule.
4. Make "agencies" singular in paragraph (C) of the rule.
5. Change "42 C.F.R. 421.300 through 306" to "42 C.F.R. 421.300 to 421.306" in paragraph (D)(11) of the rule
6. Update the references "173-39-02.1 to 173-39-02.17" to "173-39-02.1 to 173-39-02.18" throughout the rule to reflect the recent adoption of rule 173-39-02.18 of the Administrative Code.

Written comments or requests for information concerning the proposed actions may be directed to Tom Simmons at the Department on or before the date of the hearing by writing to [tsimmons@age.state.oh.us](mailto:tsimmons@age.state.oh.us).