

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Health

Regulation/Package Title: Chapter 3701-13 Direct Care Providers, Criminal Records Check of Employees

Rule Number(s): 3701-13-01 to 3701-13-09

Date: March 1, 2017

Rule Type:

New

☒ 5-Year Review

Amended

Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulations in plain language.

The rules set forth in Chapter 3701-13 of the Ohio Administrative Code implement the criminal records check requirements of sections 3712.09 (hospice) and 3721.121 (long-term care facilities) of the Ohio Revised Code. The rules require a criminal background check for all applicants for employment with a Direct Care Provider ("DCP") from the Bureau of Criminal Investigation and Identification and from the Federal Bureau of Investigation if the applicant has not resided in Ohio for at least five years. This includes all applicants under final consideration for employment by a DCP, contracted independent providers, or is referred for employment from an employment or staffing service. The rules provide the list of disqualifying offenses that may prohibit an individual from working for a DCP. Furthermore, the rules authorize the conditional employment of individual's for up to thirty days while awaiting the results of the criminal background check. Finally, the rule establishes the personal character standards a DCP might consider if they seek to

hire an applicant with certain disqualifying offenses. The Ohio Department of Health is recommending these rules be filed without amendment.

2. Please list the Ohio statute authorizing the Agency to adopt these regulations.

Ohio Revised Code sections 3712.09 and 3721.121.

3. Do the regulations implement a federal requirement? Are the proposed regulations 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?

Centers for Medicare and Medicaid Services Conditions of Participation for Hospice Programs, C.F.R. 418.114(d), requires background checks on all direct care employees in accordance with state laws; in the absence of state laws the background checks must be run within three months for all states of residence in the last three years.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable to these rules.

5. 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)?

These rules implement the current statutory requirements set forth in sections 3712.09 and 3721.121 of the Ohio Revised Code. These rules provide the necessary framework for the Department of Health to determine compliance and enforce the statutory requirements to protect the property of and ensure the safety of Ohio's health care consumers receiving direct care in designated facilities and hospice programs.

6. How will the Agency measure the success of these regulations in terms of outputs and/or outcomes?

Successful outcomes are measured through a standard survey (inspection) process approximately once every thirty-six months for hospice care programs and once every fifteen months for long-term care facilities; successful outcomes would indicate compliance with the standards and requirements set forth in Chapter 3701-13. Further evidence of success would be represented by the number of complaints received and the number of validated complaint surveys.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulations.

Initial e-mail notifications and a request for informal comments were sent to interested parties – November 3, 2016.

Department of Aging, Long-term Care Ombudsman's Office
Leading Age Ohio
Hospice Alliance of Ohio
Ohio Assisted Living Association
Ohio Health Care Association
The Academy of Senior Health Sciences, Inc.

8. What input was provided by the stakeholders, and how did that input affect the draft regulations being proposed by the Agency?

Two comments were received requesting changes to the "personal character standards" established in rule 3701-13-06 and an extension of the thirty (30) day requirement for the receipt of the criminal records check.

These comments were included in the review; however, the thirty-day timeframe for the receipt of the criminal records check is established by statute and cannot be changed without a change to the authorizing statute.

One comment from the Ohio Health Care Association asked that language be added regarding expunged or sealed records, seemingly asking that they be treated similar to a pardon. However, division (D)(1)(8) of section 2953.32 of the Revised Code specifically authorizes the disclosure of sealed records when an individual applies for employment at a nursing home, residential care facility, or hospice (and generally, criminal records check law allows the Attorney General to disclose sealed records when an individual applies for employment in a job dealing with children or the elderly). As such, this cannot be addressed without statutory change.

Another comment from OHCA dealt with inability to fingerprint/no fingerprints. As this is regarding operational issues related to the background check itself, which is the sole province of the Attorney General's Office, ODH is declining to make changes at this time. ODH is aware, however, of policies and procedures developed by the Attorney General that addresses the issue raised.

9. 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 to these rules.

10. 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?

The Ohio Department of Health is required to implement the requirements of Sections 3712.09 and 3721.121 of the Revised Code. Alternative regulations to the nine rules set forth in Chapter 3701-13 of the Administrative Code were not considered. The rules reflect the current statutory requirements and industry approved personal character standards.

11. Did the Agency specifically consider performance-based regulations? Please explain.

A performance based regulation was not deemed appropriate for this standard and not authorized by statute.

12. What measures did the Agency take to ensure that these regulations do not duplicate an existing Ohio regulation?

The agency conducted a thorough review of the Ohio Revised Code and Ohio Administrative Code to ensure there are no other regulations in place pertaining to criminal records check requirements for nursing homes, residential care facilities, and hospices.

13. Please describe the Agency's plan for implementation of these regulations, including any measures to ensure that the regulations are applied consistently and predictably for the regulated community.

Direct care providers are surveyed on an established time frame depending on the facility type. Long-term care facilities are surveyed approximately every fifteen months and hospice care programs are surveyed approximately once every thirty-six months. Surveys are also conducted as necessary as the result of complaints, to determine compliance. Surveys are conducted by specially trained program staff utilizing a standard survey document and protocols specific to the type of facility, service, or program.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with these rules. Specifically, please do the following:

a. Identify the scope of the impacted business community:

As defined in rule 3701-13-01 of the OAC, all direct care providers which includes:

- (1) An "adult day-care program" operated by and on the same site as a nursing home, residential care facility, home for the aging, or the Ohio veterans' home;
- (2) A county home or district home operated under Chapter 5155. of the Revised Code;
- (3) A "hospice care program" defined under section 3712.01 of the Revised Code;
- (4) A hospital unit certified as a nursing facility or skilled nursing facility under Title XVIII or XIX of the "Social Security Act," 49 STAT. 620 (1935), 42 U.S.C.A. 301 as amended (1981); and
- (5) A nursing home, residential care facility, or home for the aging as defined in section 3721.01 of the Revised Code and the Ohio veterans' home.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

Fees for Bureau of Criminal Investigation and Identification (BCII) and Federal Bureau of Investigation records checks.

Time necessary to request the criminal records check and compile a personnel record.

c. Quantify the expected adverse impact from the regulation:

- 1) Fee for Bureau of Criminal Investigation and Identification criminal records check for all applicants considered for employment; current BCII fee is \$22.00.
- 2) Fee for criminal records check from Federal Bureau of Investigation for each applicant considered for employment, who has not resided in Ohio for five years; current FBI fee is \$28.25. BCII will accept and process FBI background checks.
- 3) Time required to request a criminal records check and compiling personnel record.
- 4) The costs borne by the direct care provider are those generally associated with the provision of services within this industry. In most instances the Director of Nursing or designated human resources or administrative staff would be responsible for submitting the necessary documentation for the request and compiling the personnel record. Total time required would typically be less than one hour per applicant.

Registered Nurse:
\$30.19 per hour*

Human Resources Assistants:
\$18.01 per hour*

Figures from United States Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages for the State of Ohio, May, 2015, using the codes for registered nurse (29-1141) and Human Resources Assistants (43-4161).

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

ODH is required to implement sections 3712.09 and 3721.121 of the Ohio Revised Code by establishing criminal records check requirements for direct care providers. These criminal records check requirements have been in place in Ohio since 1997 and are an accepted standard of practice in the direct care industry. The criminal records check is a valuable tool for direct care providers to use when making prudent employment decisions and helps to ensure the safety and protection of property for health care consumers receiving direct care.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses?

No, the criminal records check requirements are established by statute and may not be waived for any individual employed to provide direct care services in a designated facility or hospice care program.

17. 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?

The waiver of penalties and fines for first-time paperwork offenses set forth in section 119.14 of the Ohio Revised Code will not be applied to the substantive statutory requirement for a criminal records check established in sections 3712.09 and 3721.121 of the Ohio Revised Code. The requirement for a criminal records check does not involve the direct collection of information or paperwork by the Ohio Department of Health or other regulatory body; the Direct Care Provider is required to obtain and maintain a criminal records check for each applicant considered for employment involving direct care. Failure to conduct a criminal records check on applicants for employment represents a significant potential for serious harm to health care consumers and the public interest. As authorized by the applicable state laws and rules governing the specific DCP, the department may take appropriate action against a direct care provider that violates the requirements of Chapter 3701-13 of the Administrative Code and the authorizing sections of the Revised Code applicable to the specific DCP.

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

The criminal records check requirements set forth in Chapter 3701-13 of the Ohio Administrative Code are applicable to all direct care providers, including small businesses. The Ohio Department of Health, Office of Health Assurance and Licensing, Bureau of Long Term Care and the Bureau of Community Health Care provide information and assistance to providers.

<http://www.odh.ohio.gov/odhPrograms/ltc/nurhome/nurhome1.aspx>

<http://www.odh.ohio.gov/odhPrograms/chcf/comhfs/hospice/hsp1.aspx>

Criminal records checks are obtained through the Bureau of Criminal Investigation and Identification. Assistance may be located through the office of the Attorney General:

<http://www.ohioattorneygeneral.gov/Enforcement/BCI>