

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Background Investigations

Rule Number(s): 5123:2-2-02 (Rescind) and 5123-2-02 (New)

Date: March 11, 2019

Rule Type:

☒ New
☐ Amended

☒ 5-Year Review
☒ Rescinded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 regulation in plain language.

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

Rule 5123:2-2-02 (*Background Investigations for Employment*) is due for five-year review. The rule establishes standards for conducting background investigations on persons employed or seeking employment in Ohio's service delivery system for individuals with developmental disabilities. The Department is rescinding rule 5123:2-2-02 and adopting a new replacement of the same title numbered 5123-2-02. New rule 5123-2-02 reflects revisions based on the comprehensive five-year review, including:

- Adding a definition of the Ohio Attorney General's "Retained Applicant Fingerprint Database" (also known as "Rapback").

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- Clarifying that background investigations must be conducted prior to employing an applicant.
- Adding a requirement for a responsible entity to check the Ohio Department of Medicaid Provider Exclusion and Suspension List.
- Correcting the website address for the database of Incarcerated and Supervised Offenders established pursuant to Section 5120.066 of the Revised Code.
- Removing provisions regarding implementation of rule 5123:2-2-02 when the rule went into effect in 2013.
- Adding a requirement for a responsible entity to enroll employees in direct services positions in Rapback, which had not yet been established when rule 5123:2-2-02 went into effect in 2013. (Enrolling employees in Rapback is more effective and less costly than requesting that the Bureau of Criminal Identification and Investigation conduct a criminal records check on employees every five years.)
- Clarifying that a responsible entity may not employ a person who has been found eligible for intervention in lieu of conviction for a disqualifying offense.
- Clarifying the exclusion period for a person with multiple disqualifying offenses.

Although the Department is rescinding the existing rule and adopting a new replacement rule, a version of the rule identifying, via underline and strikethrough, the revisions being made is being provided so stakeholders can readily see what is changing.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

5123.081

**3. 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.***

No.

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

Not applicable.

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)?

Section 5123.081 of the Revised Code requires the Department to adopt a rule. The rule provides the necessary framework for the Department to determine compliance and enforce

the statutory requirements intended to ensure the health and safety and protect the property of Ohioans with developmental disabilities.

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

Successful outcomes are measured through a provider compliance review process.

Successful outcomes would be indicated by a finding of compliance with these standards.

Development of the Regulation

7. 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.*

Initial development of rule 5123:2-2-02 in 2012 included a diverse group of stakeholders from across Ohio's human services delivery system. The revisions being incorporated at this time merely update the rule and keep it in alignment with the background investigations rules of Ohio's human services delivery systems.

Through the Department's rules clearance process, the rule and the Business Impact Analysis form is disseminated to representatives of the following organizations for review and comment:

Advocacy and Protective Services, Inc.
The Arc of Ohio
Autism Society of Central Ohio
Councils of Governments
Disability Housing Network
Disability Rights Ohio
Down Syndrome Association of Central Ohio
Family Advisory Council
The League
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Council for Home Care and Hospice
Ohio Department of Medicaid
Ohio Developmental Disabilities Council
Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
Ohio Provider Resource Association
Ohio Self Determination Association
Ohio SIBS (Special Initiatives by Brothers and Sisters)
Ohio Superintendents of County Boards of Developmental Disabilities
Ohio Waiver Network
People First of Ohio

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Values and Faith Alliance

The rule and the Business Impact Analysis form are posted at the Department's *Rules Under Development* webpage (<http://dodd.ohio.gov/RulesLaws/Pages/Rules-Under-Development.aspx>) during the clearance period for review and comment by the general public.

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

Input provided by stakeholders subsequent to implementation of rule 5123:2-2-02 in 2013 informed several revisions being incorporated at this time, including:

- Adding a definition for the "Retained Applicant Fingerprint Database" and including a reference to its more commonly used name, "Rapback."
- Making it clear that a responsible entity shall check required databases and request the criminal records check prior to employing an applicant.
- Clarifying the method for determining the exclusionary period when an applicant, employee, or candidate has committed multiple disqualifying offenses.

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?

When rule 5123:2-2-02 was initially developed in 2012, the following articles were reviewed and considered to inform development of the exclusionary periods for employment of persons who have disqualifying convictions:

Blumstein, A., & Nakamura, K. (2009). Redemption in an era of widespread criminal background checks. *NIJ Journal*, 263, 10-17.

Blumstein, A., & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47, 327-359.

Bushway, S., Nieuwbeerta, P., & Blokland, A. (2011). The predictive value of criminal background checks: Do age and criminal history affect time to redemption? *Criminology*, 49, 27-60.

Kurlychek, M. C., Brame, R., & Bushway, S. D. (2006). Scarlet letters and recidivism: Does an old criminal record predict future offending? *Criminology and Public Policy*, 5, 483-504.

Kurlychek, M. C., Brame, R., & Bushway, S. D. (2007). Enduring risk: Old criminal records and predictions of future criminal involvement. *Crime and Delinquency*, 53, 64-83.

Soothill, K. & Francis, B. (2009). When do ex-offenders become like non-offenders? *Howard Journal of Criminal Justice*, 48, 373-387.

The authors' findings support the tiered approach of making the employment exclusionary period shorter for less serious offenses.

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 Department did not consider alternative regulations. The rule is the result of a State government initiative to align requirements for background investigations for providers of Medicaid services across Ohio's human services delivery systems.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

No; a performance-based regulation is not appropriate for this purpose nor is it authorized by statute.

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

The rule applies to providers of services in Ohio's developmental disabilities service delivery system. The Department worked with representatives of Ohio's other Medicaid agencies to ensure agency rules align with one another. There is no other regulation in place pertaining to background investigations for providers of services in the developmental disabilities service delivery system.

13. 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.

Rule 5123:2-2-02 has been in place since January 1, 2013. The revisions reflected in replacement rule 5123-2-02 are not expected to impact the Department's efforts to ensure consistent application of the rule or the regulated community's efforts to ensure they are compliant with the rule.

Adverse Impact to Business

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

a. Identify the scope of the impacted business community;

The rule applies to all types of providers in Ohio's developmental disabilities service

delivery system, including:

- Independent providers certified by the Department (approximately 8,500),
- Agency providers certified by the Department (approximately 2,000),
- Residential facilities licensed by the Department (approximately 680),
- Intermediate Care Facilities for Individuals with Intellectual Disabilities licensed by the Department (420), and
- County boards of developmental disabilities (88).

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

Fees for Bureau of Criminal Identification and Investigation and Federal Bureau of Investigation criminal records checks.

Administrative time necessary to conduct database checks, request criminal records checks, review notifications provided by Rapback, and compile personnel records.

c. Quantify the expected adverse impact from the regulation.

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.

- Department staff estimate that conducting the database checks takes twenty minutes or less per applicant/employee. The Automated Registry Check System (ARCS) may be used to make conducting background investigations easier by checking all seven required databases at once, rather than searching seven different websites.
- The fee for a Bureau of Criminal Identification and Investigation criminal records check is \$22.00. Local entities that facilitate the checks may charge additional fees which vary.
- The fee for a Federal Bureau of Investigation criminal records check (required for applicants who have resided outside of Ohio in the past five years) is \$25.25. Local entities that facilitate the checks may charge additional fees which vary.
- The fee for enrolling an employee in Rapback is \$5 per year. Enrolling employees in Rapback is more effective and less costly than requesting that the Bureau of Criminal Identification and Investigation conduct a criminal records check on employees every five years (as required in existing rule 5123:2-2-02.)

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

Background investigations of people providing services to vulnerable populations are necessary to ensure the health and safety of individuals receiving services, are the standard for prudent employment decisions, and ultimately protect employers from risk.

Regulatory Flexibility

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

No; the criminal records check requirements are established by statute and may not be waived for any person employed in the developmental disabilities service delivery system.

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?

It is the policy of the Department to waive penalties for first-time or isolated paperwork or procedural regulatory noncompliance whenever appropriate. The Department believes the waiver of these penalties is appropriate under the following circumstances:

1. When failure to comply does not result in the misuse of state or federal funds;
2. When the regulation being violated, or the penalty being implemented, is not a regulation or penalty required by state or federal law; and
3. When the violation does not pose any actual or potential harm to public health or safety.

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

Rule 5123:2-2-02 has been in place since 2013. New replacement rule 5123-2-02 is substantially the same. Informational materials regarding background investigations are available at the Department's website:

<http://dodd.ohio.gov/CountyBoards/Resources/Pages/Background-Checks-.aspx>

Staff of the Department's Office of Provider Certification, Office of System Support and Standards, and Division of Legal and Oversight are available to provide technical assistance to providers and applicants for provider certification affected by the rule.