



Common Sense Initiative

Mike DeWine, Governor
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Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Developmental Disabilities

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Regulation/Package Title (a general description of the rules' substantive content):

Retention Payments for Direct Support Professionals

Rule Number(s): 5123-9-05

Date of Submission for CSI Review: July 13, 2022

Public Comment Period End Date: July 27, 2022

Rule Type/Number of Rules:

☒ New/ 1 rule

☐ Amended/ ____ rules (FYR? ____)

☐ No Change/ ____ rules (FYR? ____)

☐ Rescinded/ ____ rules (FYR? ____)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Reason for Submission

1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.

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**Which adverse impact(s) to businesses has the agency determined the rule(s) create?
The rule(s):**

- ☐ a. Requires a license, permit, or any other prior authorization to engage in or operate a line of business.
- ☒ b. Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- ☒ c. Requires specific expenditures or the report of information as a condition of compliance.
- ☐ d. Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

Regulatory Intent

2. Please briefly describe the draft regulation in plain language.

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

Based on a proposal by developmental disabilities service delivery system stakeholders, the Ohio Department of Developmental Disabilities is planning to adopt new rule 5123-9-05 (Home and Community Based Services Waivers - Retention Payments for Direct Support Professionals). Rule 5123-9-05 establishes requirements and processes for retention payments to benefit Direct Support Professionals providing specific Home and Community-Based Services (HCBS) to individuals enrolled in Medicaid HCBS waivers administered by the Department.

The HCBS waiver program is authorized by Section 1915(c) of the Social Security Act. HCBS waivers are available to Ohioans with developmental disabilities so they may receive services in their own homes and communities as an alternative to receiving services in an institutional setting. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State Plan and other federal, state, and local public programs as well as the support that families and communities provide. An individual with developmental disabilities enrolls in a specific waiver based on the individual's needs. As of July 1, 2022, more than 42,000 individuals were enrolled in waivers administered by the Department:

<u>Waiver</u>	<u>Enrollment</u>
Individual Options	24,314
Level One	15,901
Self-Empowered Life Funding	2,084

Additional information about the Department's waivers is available at:

<https://dodd.ohio.gov/wps/portal/gov/dodd/waivers-and-services/welcome/>

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Direct Support Professionals are the frontline staff who provide care to Ohioans with developmental disabilities. They provide a wide variety of support such as helping a person bathe and dress, prepare a meal, participate in community activities, or find and maintain a job. Direct Support Professionals are the lifeline for Ohioans who rely upon the services they provide. Direct Support Professionals may be self-employed and certified by the Department as Independent Providers or they may be employed by Agency Providers certified by the Department or Residential Facilities licensed by the Department.

- 3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

5123.04, 5123.19, 5166.21

- 4. 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.

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

Not applicable; the rule does not exceed the federal requirement.

- 6. 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)?**

The rule supports supplemental payments being made to providers of services for the purpose of stemming the tide of Direct Support Professionals leaving the developmental disabilities service delivery system for better paying and less demanding jobs in other fields.

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

The Department will measure the success of the rule by analyzing data to determine if the supplemental payments enhance Direct Support Professional retention.

- 8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**
If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

No.

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Development of the Regulation

9. 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.*

On April 21, 2022, a group of system stakeholders joined Department staff in a day-long planning session to develop a proposal to fund quarterly retention payments for HCBS providers using local (county board of developmental disabilities) funds. The group included:

Jason Abodeely	President, Values and Faith Alliance
Brent Baer	Superintendent, Wood County Board of Developmental Disabilities
Rick Black	Chief Financial Officer, Ohio Association of County Boards of Developmental Disabilities
Scott DeLong	President and Chief Executive Officer, Champaign Residential Services, Inc.
Adam Herman	Interim Chief Executive Officer, Ohio Association of County Boards of Developmental Disabilities
Debbie Jenkins	Policy Director, Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
Larry Macintosh	Director, Administrative and Support Services, Franklin County Board of Developmental Disabilities
Scott Marks	Operations Director, Ohio Provider Resource Association
Pete Moore	President and Chief Executive Officer, Ohio Provider Resource Association
John Pekar	Superintendent, Fairfield County Board of Developmental Disabilities
Lori Stanfa	Chief Policy Officer, Ohio Association of County Boards of Developmental Disabilities
Pete Van Runkle	Executive Director, Ohio Health Care Association

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On April 27, 2022, the following submitted a formal proposal to Director Hauck:

Jason Abodeely	President, Values and Faith Alliance
Adam Herman	Interim Chief Executive Officer, Ohio Association of County Boards of Developmental Disabilities
Pete Moore	President and Chief Executive Officer, Ohio Provider Resource Association
Janet Stephan	Board of Trustees, Ohio Waiver Network
Gary Tonks	President and Chief Executive Officer, The Arc of Ohio
Pete Van Runkle	Executive Director, Ohio Health Care Association

Providers helped develop and test a template to be used by participating Agency Providers and Residential Facilities to submit information and attestations required by paragraph (C)(2)(c) of the rule:

Active Day Ohio, Inc.
The Alpha Group of Delaware, Inc.
Arc Industries, Inc.
Columbus Center for Human Services, Inc.
Koinonia Enterprises, LLC
Koinonia Waiver Services, LLC
Masco, Inc.
Ohio Valley Residential Services, Inc.
Person Centered Services, Inc.
Portage Industries, Inc.
Solutions At Work
Welcome House, Inc.
Windfall Industries
Wynn-Reeth, Inc.

Through the Department's rules clearance process, the rule and the Business Impact Analysis form are 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 Rights Ohio
Down Syndrome Association of Central Ohio
Family Advisory Council

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The League
Ohio Association of County Boards of Developmental Disabilities
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
Values and Faith Alliance

The rule and the Business Impact Analysis form are posted at the Department's website during the clearance period for feedback from the general public:

<https://dodd.ohio.gov/forms-and-rules/rules-under-development/proposed+rules+for+review>

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

The rule is the product of a stakeholder-driven initiative to retain Direct Support Professionals working in the developmental disabilities service delivery system. This collaborative effort involved county boards of developmental disabilities, provider associations, and The Arc of Ohio representing Ohioans with developmental disabilities and their families. Through the leadership of the Ohio Association of County Boards of Developmental Disabilities, county boards agreed to fund this initiative. Implementation of the initiative will result in approximately \$51.48 million in local funds being used as match to draw down an additional \$91.52 million in federal funds from the Centers for Medicare and Medicaid Services.

11. 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?

Turnover of Direct Support Professionals may be measured by the percentage of Independent Providers choosing to renew provider certification, the volume of claims for payment submitted by Independent Providers, and data submitted by Agency Providers and Residential Facilities. Individuals and families who receive services have reported they are unable to recruit and retain Independent Providers. Agency Providers and Residential Facilities have indicated that due to workforce turnover, they are struggling to provide basic levels of service.

12. 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?

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None; the Department is implementing the proposal submitted by stakeholders.

- 13. 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; the federal Centers for Medicare and Medicaid Services requires Ohio to implement Medicaid-funded programs in a uniform, statewide manner.

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

The rule is implementing a new initiative. In accordance with Section 5166.21 of the Revised Code and an interagency agreement with the Ohio Department of Medicaid, the Ohio Department of Developmental Disabilities is responsible for promulgating rules regarding the Medicaid HCBS waivers it administers. Department staff collaborate with staff of the Ohio Department of Medicaid to ensure rules align with state initiatives and federal regulations.

- 15. 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.**

Department staff will collaborate with stakeholders who submitted this proposal to launch a robust systemwide awareness campaign. Information regarding rule 5123-9-05 will be shared directly with providers of services, posted at the Department's website, and widely disseminated to system stakeholders via the Department's various publications and listservs. The final-filed rule will be posted at the Department's website and disseminated to county boards of developmental disabilities and the approximately 3,000 persons who subscribe to the Department's rules notification listserv. Staff of the Divisions of Fiscal Administration, Information Technology Services, and Medicaid Administration are available to provide technical assistance as needed.

Adverse Impact to Business

- 16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**
- Identify the scope of the impacted business community; and**
 - Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and**
 - 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

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“representative business.” Please include the source for your information/estimated impact.

The rule sets forth a process to make supplemental payments to eligible providers of specific HCBS. Three types of providers may be eligible:

<u>Type</u>	<u>Description</u>	<u>Approximate Number</u>
Independent Provider	A self-employed person certified by the Department who does not employ or engage any other person to provide the services.	7,400
Agency Provider	An entity certified by the Department that employs or engages persons for the purpose of providing services.	1,200
Residential Facility	An entity licensed by the Department pursuant to Section 5123.19 of the Revised Code that provides HCBS.	650

An Independent Provider is not required to take any action to participate in the Retention Payment Program. The Department will simply issue retention payments to eligible Independent Providers who submitted claims for payment for provision of one or more of the specified HCBS in the applicable quarter.

Paragraph (C)(2) of the rule requires Agency Providers and Residential Facilities choosing to participate in the Retention Payment Program to opt-in, submit information regarding use of retention payments, and attest that retention payments were used and disbursed to Direct Support Professionals in accordance with the rule. Paragraph (E)(4) requires Agency Providers and Residential Facilities to maintain related records. These activities require staff resources, the amount of which will vary and is unknown to the Department.

Paragraph (G) of the rule sets forth that the Department may recoup and charge interest on retention payments made to a provider that was ineligible or otherwise failed to comply with the rule. A provider subject to recoupment is afforded due process pursuant to Chapter 119. of the Revised Code.

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

The rule is intended to directly benefit the frontline workers who provide services to Ohioans with developmental disabilities. The data reporting requirements for participating Agency Providers and Residential Facilities are necessary to ensure funds are used as intended and to

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measure the effectiveness of the rule in achieving the goal.

Regulatory Flexibility

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

Yes; paragraph (H) sets forth that the Director of the Department may waive a condition or specific requirement of the rule for good cause.

19. 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 when:

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

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

The Department developed a template for Agency Providers and Residential Facilities to report required information and make attestations. Staff of the Divisions of Fiscal Administration, Information Technology Services, and Medicaid Administration are available to provide technical assistance as needed.