



# Common Sense Initiative

Mike DeWine, Governor  
Jon Husted, Lt. Governor

Joseph Baker, Director

## Business Impact Analysis

Agency, Board, or Commission Name: **OHIO DEPT. OF AGING**

Rule Contact Name and Contact Information: Tom Simmons [rules@age.ohio.gov](mailto:rules@age.ohio.gov)

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

### **PROVIDER CERTIFICATION: REQUIREMENTS FOR PROVIDERS TO BECOME, AND TO REMAIN, CERTIFIED**

Chapter 173-39 of the Administrative Code establishes the requirements to become, and to remain, an ODA-certified provider.

Rule Number(s): 173-39-02

Date of Submission for CSI Review: September 9, 2024

Public Comment Period End Date: September 22, 2024 at 11:59PM.

#### Rule Type/Number of Rules:

☐ New/ # rules

☐ No Change/ # rules (FYR? ☐)

☒ Amended/ 1 rules (FYR? ☒)

☐ Rescinded/ # rules (FYR? ☐)

The Common Sense Initiative is established in RC 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. RC 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 RC 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.

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

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

[CSIPublicComments@governor.ohio.gov](mailto:CSIPublicComments@governor.ohio.gov)

**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.*

Rule 173-39-02 of the Administrative Code establishes the general requirements to become, and to remain, an ODA-certified provider. ODA proposes to amend paragraph (B)(8)(j) of rule 173-39-02 of the Administrative Code by adding the following to the end of the paragraph: "unless otherwise permitted under rule 5160-44-32 of the Administrative Code."

Without the proposed amendment, this rule prohibits a person with legal authority to represent an individual (i.e., to make decisions for an individual), such as a power of attorney, from being paid by the PASSPORT Program to be a participant-directed provider who works for the individual associated with the power of attorney. With the proposed amendment, a person with legal authority to represent an individual may be paid by the PASSPORT Program to provide services to the individual with limitations outlined in rule 5160-44-32 of the Administrative Code.

**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.**

RC §§ [121.07](#), [173.01](#), [173.02](#), [173.39](#), [173.391](#), [173.52](#), [173.522](#), [173.54](#), [173.543](#).

**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.*

In order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application for a Medicaid waiver authorizing the state to launch and maintain the Medicaid-funded component of the PASSPORT and Assisted Living Programs, [42 CFR 441.352](#) requires ODA to establish provider-certification requirements to safeguard the health and welfare of individuals who receive services through the program.

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

This rule exists to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rules to establish requirements for provider certification and the PASSPORT and Assisted Living Programs.

**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)?**

This rule exists to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rules to establish requirements for provider certification and the PASSPORT and Assisted Living Programs.

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

ODA and its designees monitor providers to ensure compliance for the continued health and safety of individuals receiving services from ODA-certified providers. [173-39-04] ODA will judge the proposed amendments to this rule to be a success when ODA and its designees find few violations against it during structural compliance reviews or investigations of alleged incidents.

**8. Are any of the proposed rules contained in this rule package being submitted pursuant to RC 101.352, 101.353, 106.032, 121.93, or 121.931?**

*If yes, please specify the rule number(s), the specific RC section requiring this submission, and a detailed explanation.*

No.

**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.*

ODA's guide [Participating in ODA's Rule Development](#) and the [main rules webpage](#) on ODA's website encourage stakeholders and the general public to contact ODA's rules and policy administrator at [rules@age.ohio.gov](mailto:rules@age.ohio.gov) to give input on improving ODA's rule. From this rule's effective date to the date of this BIA, ODA received no email from any stakeholder on this rule in that email inbox.

On August 16, 2024, ODA emailed the following stakeholders to announce the proposed amendment and to ask if they had any comments or questions about the proposed amendment:

- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- Ohio Assisted Living Association (OALA).
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- Ohio Aging (O4A).
- Ohio Association of Medical Equipment Suppliers (OAMES).
- Ohio Association of Senior Centers (OASC).
- Ohio Council for Home Care and Hospice (OCHCH).
- Ohio Health Care Association (OHCA).
- Ohio Jewish Communities.
- State Long-Term Care Ombudsman.

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

In response to its August 16, 2024 emails, OHCA said, “I see no issues” and the SLTCO said “We have reviewed the below amendment to OAC 173-39-02 and have no objections.” We received no other responses.

**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?**

ODA is not proposing to amend this rule due to scientific data.

**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? *Alternative regulations may include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.***

[RC§173.391](#) requires ODA to adopt rules to establish requirements for ODA-certified providers. Additionally, federal rules require ODA to establish adequate requirements for providers to assure the health and safety of individuals enrolled in ODA-administered programs.

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

[RC§173.391](#) authorizes only ODA to develop standards for ODA-certified providers of services to individuals enrolled in ODA-administered programs.

**14. 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.**

Before the proposed amendments to this rule takes effect, ODA will post them on ODA’s website. ODA will also send an email to subscribers of our rule-notification service to feature it.

Through regular monitoring activities, ODA and its designees will monitor ODA-certified providers for compliance. [173-39-04]

**Adverse Impact to Business**

**15. Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:**

**a. Identify the scope of the impacted business community, and**

Every ODA-certified provider.

**b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).**

*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.*

The adverse impacts of this rule are the general requirements to become and to remain an ODA-certified provider. These include the following:

- Complying with requirements mentioned in the rule, but established outside in other laws, including the following:
  - Licensure.
  - National provider identifier (45 CFR Part 162).
  - Background checks (RC §§ [173.38](#) and [173.381](#)).
  - Settings (42 CFR 441.301, and rule 5160-44-01 of the Administrative Code).
  - Records retention ([45 CFR 75.361](#)).
  - Electronic visit verification (Chapter 5160-32 of the Administrative Code).
  - Reporting abuse, neglect, or exploitation (RC §5101.63).
  - Confidentiality (RC §§ 5160.45 to 5160.481, 42 CFR 431.300 to 431.307, 45 CFR Parts 160, 162, and 164).
  - Person-centered planning (rule 5160-44-02 of the Administrative Code).
- Complying with requirements established in this rule, including the following:
  - Having a valid email address and telephone number.
  - Commercial liability insurance.
  - Supervision of volunteers.
  - Participating in ODA's mandatory free provider training.
  - Subscribing to receive email updates on ODA's rules.

The amount the PASSPORT and Assisted Living Programs pay providers for a service is an all-inclusive rate. It's intended to cover the daily costs incurred in the service plus employee-related costs. The costs incurred as a result of this rule are likely calculated as part of a provider's operational budget—the cost of doing business and clerical jobs, such as retaining records and updating policies and procedures.

Providers set the prices they bill to the PASSPORT and Assisted Living Programs. In turn, the PASSPORT and Assisted Living Programs pay each provider the amount the provider bills, so long as the price billed does not exceed the maximum that the Ohio Dept. of Medicaid (ODM) allows per unit. In the appendix to [rule 5160-1-06.1 of the Administrative Code](#), ODM establishes the units of service for the PASSPORT Program and the maximum-allowable payment for each unit. In the appendix to [rule 5160-1-06.5 of the Administrative Code](#), ODM establishes the units of service for the Assisted Living Program and the maximum-allowable payment for each unit.

**16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. (*Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors*).**

Yes. The proposed amendment will allow a person who legally represents an individual (i.e., makes decisions on the individual's behalf) to qualify for certification to be a participant-directed provider for the individual, with limitations.

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

ODA is required to develop rules establishing requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered programs.

Providers voluntarily apply for ODA certification. Certification is not required to provide a service unless a provider wants a government program that requires certification to pay the provider. Compliance with these rules is only required if a provider voluntarily chooses to participate in a program requiring certification, such as the PASSPORT and Assisted Living Programs.

### **Regulatory Flexibility**

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

Because the primary purpose of this rule is to ensure the health and safety of individuals enrolled in ODA-administered programs, the rules treat all providers the same, regardless of their size.

**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?**

ODA's primary concern is the health and safety of individuals receiving services from ODA-certified providers. Whenever possible, ODA or its designees will treat administrative violations that do not involve health and safety as opportunities for improvement through warning notices and solicitation of corrective action.

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

ODA and its designees are available to help providers of all sizes with their questions. Any person may contact [Tom Simmons](#), ODA's rules and policy administrator, with questions about this rule.