



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Sean McCullough, Director

MEMORANDUM

TO: Alicyn Carrel, Ohio Department of Health

FROM: Joseph Baker, Business Advocate

DATE: September 27, 2022

RE: **CSI Review – Home Health and Nonagency Skilled and Nonmedical Home Care Licensure (OAC 3701-60-01, 3701-60-02 (rescind and new), 3701-60-03 (rescind and new), 3701-60-04 (rescind and new), 3701-60-05 (rescind and new), 3701-60-06 (rescind and new), 3701-60-07 (rescind and new), 3701-60-08 (rescind and new), 3701-60-09 (rescind and new), 3701-60-10, and 3701-60-11)**

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Department as provided for in ORC 107.54.

Analysis

This rule package consists of one amended rule, ten new rules, and eight rescinded rules proposed by the Ohio Department of Health (Department). This rule package was submitted to the CSI Office on August 26, 2022, and the public comment period was held open through September 9, 2022. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on August 26, 2022.

The rules in this package set forth licensing requirements for home health care agencies.

Ohio Administrative Code (OAC) 3701-60-01 sets forth definitions related to licensure requirements for home health agency employment and has been amended to incorporate new definitions for immediate family members, community-based long-term care subcontractors, non-agency providers, nonmedical home health services, personal care services, and self-administration of medication, among others. New OAC 3701-60-02 prohibits home health agencies and nonagency

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providers from presenting themselves as skilled home health services providers or nonmedical home health services providers or providing such services without a valid license and sets forth the penalty for doing so as either a first- or second-degree misdemeanor. New OAC 3701-60-03 sets forth the application process for licensure as a home health agency or nonagency provider seeking to provide skilled home health services or nonmedical home health services. Under the rule, providers must pay a license fee of \$250, complete an application form, provide the Department a copy of their criminal records check policy, submit documentation demonstrating the maintenance of a surety bond, and comply with other related requirements. New OAC 3701-60-04 authorizes the Director of the Department (Director) to deny, suspend, or revoke a license for various causes such as making a material misrepresentation in the application, failing to timely renew a license, and not complying with the rules in the chapter or the Revised Code, but allows for a hearing if requested by the licensee.

New OAC 3701-60-05 requires home health agencies to conduct a state and national database review regarding each applicant or employee who provides direct care and specifies the required databases to be reviewed. The rule also prohibits agencies from employing individuals if a review of the required databases indicates the individual has committed various disqualifying offenses or if a database review discloses a statement detailing findings that the individual neglected, abused or stole from a long-term care facility or residential care facility resident. New OAC 3701-60-06 requires home health agencies to conduct criminal background checks on employees who provide direct care upon hire, and again every five years when an individual is employed in a direct care position. The rule additionally requires the agency to inform applicants regarding the background check requirements for direct care positions and pay the background check fee for prospective employees (though it authorizes the home health agency to charge the fee to the applicant in certain conditions).

New OAC 3701-60-07 allows home health agencies to temporarily employ applicants (for up to sixty days) prior to obtaining criminal records check if a review of the state and national databases do not reveal disqualifying information, fingerprint impression sheets from the applicant have been collected, and the agency or an employment service requests the criminal records check within five days of the individual beginning employment. New OAC 3701-60-08 and 3701-60-09 set forth offenses that involve disqualification from licensure or a temporary exclusion from licensure (based on the type of offense) and prohibits agencies from hiring individuals who have committed a permanently disqualifying offense, or from hiring an individual who has committed a temporarily disqualifying offense within the exclusionary period (ranging from five to ten years). The rule also addresses various exceptions, including commission of minor drug-related offenses with no exclusionary period, individuals who have received court-certified qualification for employment, grandfathering of certain offenses prior to 2013, and pardons.

New OAC 3701-60-10 addresses records and report requirements, including specifying that criminal records checks are not considered public records. The rule also requires agencies to maintain the confidentiality of certain personnel records, documentation of compliance regarding the completion of criminal records checks, employee start dates, and to attest compliance upon the request of the

Director. Finally, new OAC 3701-60-11 addresses civil liability for home health agencies who employ an individual who causes injury, death or loss while providing direct care and states that the agency shall not be considered negligent if it relies on faulty criminal records check or employs the individual prior to receiving a report on the conditional basis as described in 3701-60-07. The rule also generally authorizes the Department to take appropriate action against agencies that violate the chapter or the Revised Code. The Department proposes to rescind existing OAC 3701-60-02, 3701-60-03, 3701-60-04, 3701-60-05, 3701-60-06, 3701-60-07, 3701-60-08, and 3701-60-09 based on the proposed adoption of the new rules by the same number.

During early stakeholder outreach, the Department consulted with stakeholders including the Ohio Council for Home Care and Hospice, Home Care Association of America Ohio Chapter, National Church Residencies, and others. Based on feedback from stakeholders, the Department adopted several changes prior to submitting to CSI for review. Eighteen comments were received during the CSI public comment period. Two comments recommended amending the statutory list of disqualifying offenses cited by the rule to remove a reference to unlawful abortions. The agency responded that the rule does not disqualify individuals engaged in legal medical procedures. Another comment requested clarification that skilled therapy providers that provide staff by contract to home health agencies are not classified as home health agencies under the rules. The Department confirmed that such providers are not captured by the licensing requirements. One commenter recommended raising the licensing fee from \$250 to prevent bad actors in the field, while a separate individual recommended reducing the fee to increase access to care. The Department responded that the fee is set by statute.

Five commenters, including the National Association of Rehab Providers and Agencies, recommended clarifying whether entities that provide care in certain housing contexts such as independent living or assisted living facilities are required to be licensed as home health agencies and how to determine whether the rules apply to such types of providers. The Council on Aging of Southwestern Ohio recommended excluding consumer-directed providers from the rules and exempting entities that are credentialed by the Ohio Department of Medicaid, Department of Aging, or Department of Developmental Disabilities. The Department responded that businesses that provide in-home care to patients will need to determine whether the primary function of the business is to provide in-home care or in a clinical setting, but that a group practice that provides contracted care with a facility or provides staff to a facility that does not schedule independent appointments would not be affected by the rules.

Several other similar comments recommended exempting certain independent nurses from the rules and clarifying or eliminating the surety bond requirement. The Department responded that the exemptions from licensure are specified in statute, that independent providers certified by the Ohio Department of Medicaid or the Ohio Department of Aging do not need to be licensed unless they provide services to more than two clients simultaneously, and that the surety bond requirements are specified in statute. The Department further noted that business-based services such as grocery

delivery or housekeeping would not be affected by the licensing scheme, and that the surety bond requirements would be clarified in an upcoming form. One comment recommended clarifying the requirements for informal or formal dispute resolution, and background check responsibilities for providers. The Department responded to the comment stating that providers must obtain criminal records checks upon hiring and at least every five years, that the RAPBACK system may be utilized for background check purposes, and that informal or formal dispute resolution processes can be selected at the discretion of the provider.

The Ohio Council for Home Care and Hospice thanked the Department for its implementation of many suggestions during early stakeholder outreach but requested additional language clarifying that subcontracting home health agencies are not defined as home health agencies, as it is not possible for many of them to meet the licensing requirements, resulting in many agencies being unable to provide services. The Department stated that the statutory definition of home health agency depends on whether the entity primarily provides care in a home-based setting, and that the rules do not require group practices to be licensed if they provide staff to a facility and do not schedule appointments independently.

Finally, the Ohio Association of Area Agencies on Aging recommended specifying that Ohio Department of Aging Home Care Attendant Services are exempted from the licensure requirements, that additional clarifying language be added to specify that businesses providing maid services or grocery and prescription pickup services are not required to be licensed, that additional payment methods aside from cashier's checks and money orders be permitted, removal of surety bond requirements for small business licensees, the removal of the fee for entities already certified by the Department of Aging, and updates for the language regarding fingerprint cards and impression sheets to reflect current processes. The Department responded that it cannot exempt providers without statutory authority, that the definition of personal care services is specified in statute, that the Department will accept personal check payments, and that the fee, fingerprint, and surety bonding requirements are specified in statute.

The business community impacted by the rules includes all home health and homecare providers in Ohio. The Department reports that there are currently 775 such certified home health entities and an unknown number of uncertified providers. The adverse impacts to business include a \$250 application fee every three years, costs of conducting background checks upon the hire of a new employee and every five years for existing employees, costs associated with acquiring and maintaining a surety bond, maintaining records documenting compliance with various rule requirements, potential disciplinary action for failing to comply with the rules, and staff time necessary to review the rules, complete, and apply for licensure. The Department estimates that the process of reviewing the rules and applying for licensure will require approximately forty-five minutes for businesses. The Department states that the adverse impacts to business are necessary to provide the necessary framework for the licensure of home health agencies and nonagency providers in Ohio, as directed by the Ohio Revised Code.

Recommendations

Based on the information above, the CSI Office has no recommendations on this rule package.

Conclusion

The CSI Office concludes that the Department should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.