



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Carrie Kuruc, Director

MEMORANDUM

TO: Alicyn Carrel, Ohio Department of Health

FROM: Danielle Dillard, Regulatory Policy Advocate

DATE: February 28, 2019

RE: **CSI Review – Alcohol and Drug Testing (OAC 3701-53-01, 3701-53-02, 3701-53-03, 3701-53-04, 3701-53-05, 3701-53-06, 3701-53-07, 3701-53-08, 3701-53-09, 3701-53-10, and 3701-53-11)**

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 Agency as provided for in ORC 107.54.

Analysis

This rule package consists of ten rescinded rules, and eleven new rules, submitted by the Ohio Department of Health (Department) as part of the statutorily required five-year rule review. The rule package was submitted to the CSI Office on December 31, 2018, and the comment period remained open until January 31, 2019. No comments were received during that time.

The rules contain the requirements for breath alcohol testing, and laboratory testing of blood, urine, and other bodily substances for alcohol and drugs in Operating a Vehicle under the Influence cases. Specifically, the rules outline qualifications for breath test operators, senior operators, laboratory directors, and laboratory technicians. The eleven new rules replace the ten rescinded rules and make minor changes to add clarity to various requirements. No substantive changes are being made.

As part of early stakeholder outreach the Department held two stakeholder meetings, one with law enforcement representatives from the Ohio State Patrol, Columbus Police Academy, and the Cincinnati Police Department, the other with laboratory stakeholders. Law enforcement stakeholders gave feedback focused on the inconvenience of centralized recordkeeping for breath test instrument

77 South High Street | 30th Floor | Columbus, Ohio 43215-6117
CSIOhio@governor.ohio.gov

information. The Department noted that the rules allow individual law enforcement agencies to assume responsibility for maintaining breath alcohol test records. Laboratory stakeholders pointed out the need to clarify specific techniques in the rule as approved methods for drug analysis, as well as the need to specify oral fluid as an acceptable specimen for testing. The Department made the requested clarifications. No comments were received during the CSI public comment period.

The rules impact all four non-government laboratories that currently hold permits to analyze samples in Operating a Vehicle under the Influence cases, as well as government forensic laboratories, coroner's laboratories, the Ohio State Highway Patrol laboratory, and law enforcement agencies. Impacted entities must use the instruments, equipment, and techniques specified by the rule to collect, handle, and perform testing of samples. Law enforcement agencies must use specified instruments and equipment to perform breath alcohol tests in the field. All laboratory and law enforcement personnel must meet the qualifications specified in the rules to perform tests, as well as collect and handle testing samples. The changes to the rules do not present any additional adverse impact, because they are able to continue to use the same equipment and testing methods that are currently approved. Only new analysis methods were added to the rules.

The Department justifies any adverse impact by noting that the rules promote and protect public safety, by allowing law enforcement agencies to conduct breath alcohol testing. It also notes that the rules provide uniform standards for the collection, handling, and testing of samples used in Operating a Vehicle under the Influence cases.

Recommendations

For the reasons described above, the CSI Office has no recommendations on this rule package.

Conclusion

Based on the above comments, the CSI Office recommends that the Ohio Department of Health should proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review.



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: August 26, 2022

RE: **CSI Review – Alcohol and Drug Testing (OAC 3701-53-01 (rescind & new), 3701-53-02 (rescind & new), 3701-53-03 (rescind & new), 3701-53-04 (rescind & new), 3701-53-05 (rescind & new), 3701-53-06 (rescind & new), 3701-53-07 (rescind & new), 3701-53-08 (rescind & new), 3701-53-09 (rescind & new), 3701-53-10 (rescind & new), and 3701-53-11)**

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 eleven new rules and ten rescinded rules proposed by the Ohio Department of Health (Department) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on June 17, 2022, and the public comment period was held open through July 17, 2022. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on June 17, 2022.

New Ohio Administrative Code (OAC) 3701-53-01 specifies definitions related to alcohol and drug testing and record retention periods for breath alcohol tests, laboratory tests, certifications and weekly checks, and records of repairs and maintenance. New OAC 3701-53-02 sets forth standards regarding the description of test results, while new OAC 3701-53-03 authorizes certain devices to be used as breath testing instruments for determining alcohol concentration and sets forth standards for using such devices. New OAC 3701-53-04 sets forth approved techniques for analyzing alcohol in blood, urine and other bodily fluids or for analyzing controlled substances. New OAC 3701-53-

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

CSIPublicComments@governor.ohio.gov

05 requires instrument checks to be performed on devices used for alcohol and drug testing and sets forth minimum standards and timeframes for performing such checks

New OAC 3701-53-06 specifies standards for collecting and handling blood samples, urine specimens, and oral fluid specimens. New OAC 3701-53-06 sets forth standards for laboratories that conduct alcohol and drug testing, including securely maintaining test result records for three years, maintaining bodily substances for at least one year from testing date, producing a written procedure manual, notifying the Director of Health (Director) if the laboratory director ceases to serve in that capacity, and ensuring that tests are exclusively performed by laboratory technicians or the director using methods of analysis that are specified on the laboratory permit. New OAC 3701-53-08 specifies qualification requirements for laboratory personnel, including laboratory director permits and technician permits. The rule also requires that senior operators be responsible for the care, maintenance, and certification or instrument checks of evidential breath testing instruments and sets forth minimum standards for such professionals.

New OAC 3701-53-09 authorizes the Director to require laboratory directors, technicians, and senior operators or operators to complete surveys or proficiency examinations at the Director's discretion. New OAC 3701-53-10 requires individuals serving as laboratory directors, laboratory technicians, senior operators or operators to apply for a permit or operator access card from the Director prior to fulfilling professional duties. Finally, OAC 3701-53-11 authorizes the Director to suspend or revoke the permit or operator access card for various reasons, including obtaining the permit or access card falsely or deceitfully, failing to comply with practice requirements, failing to demonstrate ability to properly operate an instrument for which the permit is held, and others. The Department proposes to rescind existing OAC 3701-53-01 through OAC 3701-53-10 due to the proposed adoption of the new rules.

During early stakeholder outreach, the Department provided the proposed rules with laboratory directors and law enforcement stakeholders. Based on feedback from the business community, the Department revised the rules prior to submitting to CSI for review. Five stakeholder comments were received during the CSI public comment period. One stakeholder shared support for the rules as proposed. Two crime laboratories questioned whether the Department would allow for alternate methods of reporting oral fluid test results. In response, the Department proposed to allow reporting of the presence of controlled substances or drugs in oral fluids with cut off levels expressed in nanograms per milliliter. The Ohio State Highway Patrol suggested various typographical corrections and including a definition for metabolite, which the Department agreed to adopt. Finally, a stakeholder recommended correcting a device name to reflect the current instrument title, which the Department agreed to update.

The business community impacted by the rules consists of non-governmental laboratories that currently hold permits to analyze Operating a Vehicle Impaired (OVI) samples. The adverse impact to business consists of staff time and training required to renew permits (estimated at under four

hours annually), provide proficiency information related to permit holders (estimated at between twenty to forty hours annually), and participate in surveys (estimated at between four to six hours annually). The Department reports to CSI that no fees are charged to acquire the permit. Additionally, the Department notes that laboratories holding permits are required to provide various documents to courts in response to discovery demands and to provide testimony for hearings and trials. The Department states that the adverse impact created by the rules is necessary to comply with its statutory obligation to approve methods and issue permits for the analysis of a person's breath and other bodily substances to ascertain the presence and amount of alcohol, drugs, and controlled substances.

Recommendations

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

Conclusion

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