



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Joseph Baker, Director

MEMORANDUM

TO: Selina Jackson, Ohio Department of Health

FROM: Michael Bender, Business Advocate

DATE: August 2, 2023

RE: **CSI Review – Direct Care Provider Employees – Criminal Records Checks (OAC 3701-13-01, 3701-13-02, 3701-13-03, 3701-13-04, 3701-13-05, 3701-13-06, 3701-13-07, 3701-13-08, and 3701-13-09)**

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 eight amended rules and one no-change rule proposed by the Ohio Department of Health (ODH) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on March 28, 2023, and the public comment period was held open through April 27, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on March 28, 2023.

Ohio Administrative Code (OAC) 3701-13-01 specify definitions pertaining to direct care providers (DCPs). The rule is amended to update language and definitions and to remove a term. OAC 3701-13-02 sets forth the applicability of the rules of OAC 3701-13 and requires DCPs to request criminal background checks on all applicants for positions that provide direct care to older adults. The rule is amended to update language and remove the exception for employees hired before January 27, 1997, to the criminal records check requirement. OAC 3701-13-03 outlines the requirements for the chief administrator of a DCP when requesting criminal background checks from the Bureau of Criminal Investigation and Identification (BCII) and/or from the Federal Bureau of Investigation (FBI) through the BCII of applicants for positions that provide direct care to an older adult. The rule is amended to

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update language, add clarifying language, allow the criminal records check form and standards fingerprint impression sheets to be in a tangible format, electronic format, or both, and remove the exception for employees hired before January 27, 1997, to the authorization for DCPs to request criminal records checks for positions that do not involve providing direct care to an older adult. OAC 3701-13-04 sets forth the requirements for a DCP to conditionally employ an applicant. The rule is amended to update language and add clarifying language. OAC 3701-13-05 lists the criminal offenses that disqualify a person from being employed in a position that provides direct care to an adult. The rule is amended to update language and the titles of referenced ORC sections.

OAC 3701-13-06 identifies the personal character standards which an applicant who has been convicted of or pleaded guilty to a disqualifying offense must meet in order to be employed by a DCP in a position that provides direct care to an older adult. The rule is amended to update language and citations, add clarifying language, and remove the restriction on hiring an individual with multiple theft related offenses on the conditions that the victims of the offenses were not older adults and that at least seven years have passed since the individual has fulfilled all penalties. OAC 3701-13-07 prohibits criminal records check reports from being disclosed, except to certain individuals, and specifies recordkeeping requirements for DCPs with respect to applicants and criminal background checks. The rule is amended to update language and a citation. OAC 3701-13-08 establishes the scope of liability for a DCP in a tort or other civil action for damages brought as a result of injury, death, or loss to person or property caused by an individual it employs in a position providing direct care to older adults. The rule is amended to update language. OAC 3701-13-09 authorizes ODH to take action against a DCP for violations of OAC 3701-13 and authorizing statutes.

During early stakeholder outreach, ODH consulted with the Ohio Department of Aging Office of the Long-Term Care Ombudsman, LeadingAge Ohio, the Ohio Council for Homecare and Hospice, the Ohio Assisted Living Association, the Ohio Health Care Association, and The Academy of Senior Health Sciences, Inc. Stakeholders requested the elimination of the prohibition on hiring multiple theft-related offenders, which ODH incorporated into the rules. During the CSI public comment period, ODH received a joint set of comments from the Ohio Olmstead Task Force (OOTF) and The Ability Center of Greater Toledo. The OOTF and The Ability Center supported expanding access to fingerprint impressions and establishing conditional hiring, but they requested that ODH expand the definition of “older adults” to include adults under the age of sixty. Additionally, the OOTF and The Ability Center urged ODH to reevaluate the personal character standards to ensure that individuals who commit felonies or violent offenses are ineligible for a direct care position, include victims that are children and adults under the age of sixty, and refrain from using a victim’s mental capacity as a factor. In response, ODH pointed out that the term “older adult” is defined in statute and that the rules do not limit the considerations or protections of residents under the age of sixty. Furthermore, ODH noted that the provisions regarding personal character standards reflect authorizing statutes and protected classes but do not limit the use of other considerations by an employer. No changes to the

rules were made as a result of the comments, although ODH made technical corrections.

The business community impacted by the rules includes all DCPs such as adult day-care programs, county or district homes, hospice care programs, hospital units certified as nursing facilities or skilled nursing facilities, nursing homes, residential care facilities, homes for the aging, and the Ohio Veterans Home. The adverse impacts created by the rules include paying fees for a criminal records check, recordkeeping requirements, and compiling documentation. According to ODH, the current BCII fee is \$22.00 while the current FBI fee is \$18.00. ODH also notes that, citing the United States Department of Labor Bureau of Labor Statistics, the average salaries for registered nurses and human resources assistants are \$34.44 per hour and \$20.46 per hour, respectively. ODH states that the adverse impacts to business are justified to implement statutory requirements and to ensure the safety and protection of older adults receiving direct care.

Recommendations

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

Conclusion

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