

NOTICE OF PUBLIC RULES HEARING

DATE: Thursday, December 8, 2022
TIME: 1:30 p.m.
LOCATION: Via Electronic Teleconference
CALL-IN INFO: Microsoft Teams meeting

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In accordance with *Chapter 119* of the Revised Code (R.C.), the Director of the Ohio Department of Health announces a Public Hearing at the date and time listed above to hear comments regarding the following action:

Ohio Revised Code (O.A.C.) Chapter 3701-53 – 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)

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 3701-53-05 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.

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New OAC 3701-53-07 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.

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.

Information regarding rule package proposed:

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.

Ohio Revised Code (O.A.C.) Chapter 3701-60 – 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)

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.

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New OAC 3701-60-02 prohibits home health agencies and nonagency 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.

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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.

Information regarding rule package proposed:

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.

Hearing and Contact Information:

Information about the hearing, people affected by the proposed action may appear via teleconference and be heard or in tandem with an attorney. They may present their positions, arguments, or contentions orally or in writing; may offer witnesses; and may present evidence showing that the proposed rule, if adopted or effectuated, will be unreasonable or unlawful.

To aid in getting the call to be organized and go as smooth as possible, any persons intending to testify on the tele-Public Hearing or planning to observe are encouraged to email Alicyn.Carrel@odh.ohio.gov immediately. Please include in the subject of your email – TESTIFYING IN PUBLIC HEARING and the DATE of the Public Hearing in which you are testifying.

Copies of the proposed rules will be available on the Register of Ohio website: <http://www.registerofohio.state.oh.us/rules/search> approximately one day after the rule is filed, or from the Office of the General Counsel, Ohio Department of Health (<https://odh.ohio.gov/health-rules-laws-and-forms>)

Please e-mail any written comments or RSVP if you are planning on testifying to Alicyn.Carrel@odh.ohio.gov by 5:00 p.m. on Tuesday, December 6, 2022.