

Rule 5123-2-02
(Background Investigations for Employment)
Effective July 1, 2019

Questions Submitted by the Ohio Provider Resource Association

- 1. Is "pre-trial diversion" the same as "intervention in lieu of conviction?" At a minimum, I would like to hear the rationale for the decision and if there is a difference.**

No. Although "pre-trial diversion" programs and "intervention in lieu of conviction" have features in common, they are not the same. Section 2935.36 of the Ohio Revised Code is the statutory authority for pre-trial diversion programs. Diversion programs are established at the discretion of local prosecutors for persons accused of committing a crime and whom the prosecutor believes will not re-offend. These programs are created to resolve cases outside of the criminal justice system and give offenders (typically first-time offenders who have committed theft offenses) an opportunity to avoid a criminal conviction. Once a person completes the diversion program, any charges that were filed are dismissed by the prosecutor. Some diversion programs require a person to admit to his or her wrongdoing (which is not the same as entering a plea of guilty).

"Intervention in lieu of conviction" is a statutory criminal procedure established in Section 2951.041 of the Ohio Revised Code and administered by the courts. Eligibility for "intervention in lieu of conviction" is determined by the court. Under Section 2951.041, if the court has reason to believe that drug or alcohol usage by the person was a factor leading to the person committing the criminal offense or the person has mental illness, is a person with an intellectual disability, or was a victim of human trafficking and that the mental illness or person's intellectual disability or the fact that the person is a victim of human trafficking was a factor leading to the criminal behavior, the court may accept the person's request for "intervention in lieu of conviction." A request for "intervention in lieu of conviction" must include a statement from the person alleging that at the time of committing the offense, one of the following conditions was a factor leading to the criminal offense: (1) alcohol or drug use; (2) the person had mental illness; (3) the person has an intellectual disability; or (4) the person was a victim of human trafficking. Section 2951.041 provides a list of criteria the court must consider. The court may require

assessments of the person to determine his or her appropriateness for "intervention in lieu in conviction" and to recommend an appropriate intervention plan. To receive "intervention in lieu of conviction," a person must enter a plea of guilty. The court then postpones any further criminal proceedings. Section 2951.041 requires the person to undergo treatment for the condition alleged to be a factor in the criminal offense for a minimum of one year. The court may impose other terms and conditions. Persons placed in "intervention in lieu conviction" by courts are reported to the Bureau of Criminal Identification and Investigation and a criminal background check will indicate that they have received "intervention in lieu of conviction." The charges are only dismissed if the person complies with all requirements of his or her intervention plan.

- 2. I am unsure how to proceed with the guidance [issued on June 10] regarding "intervention in lieu of conviction." DODD states that the employee cannot work in the field but after he or she completes the program, he or she will NOT have a disqualifying offense on his or her record. How do we deny employment when the person will not have the disqualifying offense on their record? Can he or she reapply?**

While a person is in "intervention in lieu of conviction," this status appears on his or her criminal background check. The basis for denying employment is that Section 109.572 of the Ohio Revised Code sets forth that a person who has been found eligible for intervention in lieu of conviction for any of the disqualifying offenses is not eligible for employment.

Yes; a person may later be employed provided he or she has successfully completed the court-ordered treatment program and the court has dismissed the criminal charge.

- 3. Diversion programs are not specifically mentioned in the rule and it does not specifically state that a diversion program is the same as "intervention in lieu of conviction." For instance, a diversion program can be payment of restitution and essentially three years of probation to have the pending charge waived, which is not intervention as defined in the rule. So, I see no guidance in the rule with regards to a diversion program that is not intervention in lieu of conviction. With the proliferation of these programs, I would have expected that an employee or candidate in a treatment or diversion program would have the pending charge waived for Tier Four offenses without recurrence.**

A diversion program is not the same as intervention in lieu of conviction. Please see

the response to question 1 for an explanation. The Department has aligned rule 5123-2-02 with the existing statute. The Department has no authority to "waive" or not enforce the requirements for Tier Four offenses.

4. Does "intervention in lieu of conviction" include contractors, therapists, auditors, and dietitians?

To determine who is subject to rule 5123-2-02, please look to the definitions within the rule. The rule applies to a "responsible entity" which, as defined in paragraph (B)(14), includes an agency provider or subcontractor in the case of an applicant for or person employed in a direct services position. "Direct services position" is defined in paragraph (B)(7) to mean an employment position in which the employee has the opportunity to be alone with or exercises supervision or control over one or more persons with a developmental disability

5. I have a current employee charged with petty theft (2913.02) that is a disqualifying offense. Due to the situation, the court has allowed a diversion program that she must attend for 10 weeks and then the charges will be dropped. She pleaded "not guilty" and as long as she is compliant, her record will be clear of any disqualifying offense. Under the new proposed rule is she ineligible beginning July 1?

Rule 5123-2-02 prohibits a responsible entity from employing or continuing to employ a person who: (1) has been convicted of, (2) pleaded guilty to, or (3) has been found eligible for intervention in lieu of conviction for a disqualifying offense. It sounds as though your employee is in a pre-trial diversion program, but you need to verify that your employee has not received "intervention in lieu of conviction." If the employee is in a pre-trial diversion program, she has been charged with an offense. The rule does not prohibit a responsible entity from employing or continuing to employ a person who has been **charged** with a disqualifying offense.

It is important for a responsible entity to:

- Clearly set forth in writing, its policy regarding employment of persons charged with disqualifying offenses. The policy should address charges that are related to major unusual incidents (as defined in rule 5123-17-02).
- Ensure it implements its written policy in a uniform and consistent manner.

6. We have a new hire who was charged and pleaded guilty to a shoplifting offense under 2913.02. However, the employee was not convicted of the charge against her. When she successfully completes the pre-trial diversion

program the pending charge will be dismissed. Does this meet the standard for a "disqualifying offense" and is she subject to discharge, or can she proceed with employment based on the manner in which the court has elected to address the charge?

Please see the response to the question 5.

It sounds as though the court is giving your employee an opportunity to complete a pre-trial diversion program and the criminal proceedings will be stayed for the duration of the diversion program. If she successfully completes the diversion program, the charge will be dismissed. If not, she will have a conviction for theft under Section 2913.02 of the Ohio Revised Code (a Tier Four Disqualifying Offense) and she will not be eligible for employment until five years from the date she is fully discharged from imprisonment, probation, and parole.

- 7. I just feel defeated at times because we as providers and the department have identified the most pressing issue facing our field and the people we serve, lack of direct support professionals. This rule puts yet another barrier to hiring people that may have made a stupid decision. I know we have to protect the people we serve as they could easily be taken advantage of but we also need balance between health and welfare and having people to provide the services they require.**

We understand and appreciate the difficulty of recruiting and retaining qualified staff. The "intervention in lieu of conviction" language has been in the statute since 2012. The State's Medicaid agencies have committed to uniformly implementing the existing statute. Background investigations are a critical element of ensuring health and safety for those who receive services.