

OHIO'S NEW CRIMINAL BACKGROUND CHECK REQUIREMENTS



STEPHEN P. POSTALAKIS
BLAUGRUND, HERBERT, KESSLER, MILLER,
MYERS & POSTALAKIS, INCORPORATED
300 WEST WILSON BRIDGE ROAD, SUITE 100
WORTHINGTON, OHIO 43085
(614) 923-3112
SPP@BHMLAW.COM

OHIO ASSOCIATION OF COUNTY BOARDS
SERVING PEOPLE WITH
DEVELOPMENTAL DISABILITIES
2012 ANNUAL CONVENTION
HILTON AT EASTON

Statutes and Regulations



- Statutes:
 - R.C. §5123.081 (R.C. §5126.28 repealed)
 - R.C. §109.572(A)(3)(a)-(e) (contains list of disqualifying offenses)
- Regulation
 - OAC 5123:2-2-02

Statutes – R.C. §5123.081



- Amended and replaces R.C. §§5126.28 and 5126.281
- Applies to “applicants” :
 - (i) A person who is under final consideration for appointment to or employment with the department of developmental disabilities or a county board of developmental disabilities;
 - (ii) A person who is being transferred to the department or a county board;
 - (iii) An employee who is being recalled to or reemployed by the department or a county board after a layoff

Statutes – R.C. §5123.081



- Does not apply to an employee who:
 - is employed by a responsible entity (i.e., county board) in a position for which a criminal records check is required by this section **and** either is being considered for a different position with the responsible entity or is returning after a leave of absence or seasonal break in employment, unless the responsible entity has reason to believe that the person has committed a disqualifying offense

Statutes – R.C. §5123.081



- Defines employee as either of the following:
 - A person appointed to or employed by the department of developmental disabilities or a county board of developmental disabilities;
 - A person employed in a direct services position by a provider or subcontractor.

Statutes – R.C. §5123.081



- Defines “responsible entity” for purposes of complying with the law:
 - A county board of developmental disabilities in the case of either of the following:
 - ✦ A person who is an applicant because the person is under final consideration for appointment to or employment with the county board, being transferred to the county board, or being recalled to or reemployed by the county board after a layoff;
 - ✦ A person who is an employee because the person is appointed to or employed by the county board.

Statutes – R.C. §5123.081



- A responsible entity shall not employ an applicant or continue to employ an employee if either of the following applies:
 - The applicant or employee fails to comply with R.C. §5123.081(D)(3) (consent form and fingerprints).
 - Except as provided in rules adopted under statute, the applicant or employee is found by a criminal records check required by this section to have been convicted of, pleaded guilty to, or been found eligible for intervention in lieu of conviction for a disqualifying offense.

Statutes – R.C. §5123.081



- Responsible entity may request any other state/federal agency to supply the responsible entity with a written report regarding the criminal record of an applicant **or employee**.
- If an **employee** holds an occupational or professional license or other credentials, the responsible entity may request that the state/federal agency that regulates the employee's occupation or profession supply the responsible entity with a written report of any information pertaining to the employee's criminal record that the agency obtains in the course of conducting an investigation or in the process of renewing the employee's license or other credentials.
- The responsible entity may consider the reports when determining whether to employ the applicant **or to continue to employ the employee**.

Statutes – R.C. §5123.081



- Does not necessarily require background checks of employees.
- Division (J):
 - The director of developmental disabilities shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section.
 - ✦ (1) The rules **may** do the following:
 - (a) Require employees to undergo criminal records checks;
 - (b) Require responsible entities to obtain the driving records of employees;
 - (c) If the rules require employees to undergo criminal records checks, require responsible entities to obtain the driving records of employees, or both, exempt one or more classes of employees from the requirements.

Statutes – R.C. §5123.081



- ✦ (2) The rules **shall** do both of the following:
 - (a) If the rules require employees to undergo criminal records checks, require responsible entities to obtain the driving records of employees, or both, specify the times at which the criminal records checks are to be conducted and the driving records are to be obtained;
 - (b) Specify circumstances under which a responsible entity may employ an applicant or employee who is found by a criminal records check required by this section to have been convicted of , pleaded guilty to , or been found eligible for intervention in lieu of conviction for a disqualifying offense but meets standards in regard to rehabilitation set by the director.

Statute – R.C. §109.572



- Lists disqualifying offenses in division (A)(3)(a) – (e).
- Pursuant to division (B)(1), can review sealed records of conviction:
 - Subject to division (F) of this section, the superintendent shall conduct any criminal records check to be conducted under this section as follows:
 - (1) The superintendent shall review or cause to be reviewed any relevant information gathered and compiled by the bureau under division (A) of section 109.57 of the Revised Code that relates to the person who is the subject of the criminal records check, **including, if** the criminal records check was requested under section ... 5123.081 ... of the Revised Code, **any relevant information contained in records that have been sealed under section 2953.32 of the Revised Code**;

Regulation – OAC 5123:2-2-02



- Renders criminal background checks applicable to county board employees:
 - "Employee" means a person appointed to or employed by the department or a county board or a person employed in a direct services position by an agency provider or subcontractor.
 - “Responsible entity” means A county board in the case of an applicant under final consideration for appointment to or employment with the county board, being transferred to the county board, or being recalled to or reemployed by the county board after a layoff or a person appointed to or employed by the county board.

Regulation – OAC 5123:2-2-02



- Imposes new requirements on County Boards:
 - A responsible entity shall:
 - ✦ (a) Require an applicant to complete an employment application and provide the names and addresses of present and former employers; and
 - ✦ (b) Attempt to obtain references from the applicant's present and former employers and maintain written evidence that reference checks were attempted and/or completed.

Regulation – OAC 5123:2-2-02



- Adds additional databases to review:
 - OIG exclusion list
 - Abuser registry
 - Nurse aide registry
 - sex offender and child-victim offender database established pursuant to R.C. §2950.13A)(11)
 - The United States general services administration system for award management database (available at <https://www.sam.gov/>)
 - Database of incarcerated and supervised offenders established pursuant to R.C. §5120.066

Regulation – OAC 5123:2-2-02



- Excludes certain individuals from transporting individuals:
- Responsible entity shall verify that applicant has a valid motor vehicle operator's license and obtain a driving record prepared by BMV **if** the duties of the position for which the applicant has applied require the applicant to transport individuals **or** to operate the responsible entity's vehicles for any other purpose.
- A person having **six or more points** on his or her driving record is prohibited from transporting individuals.

Regulation – OAC 5123:2-2-02



- Still requires a statement (affidavit) that he or she has not been convicted of or pleaded guilty to a disqualifying offense.
- An applicant or employee shall disclose to the responsible entity a conviction for any offense that has been sealed.
- Still requires the applicant to notify the responsible entity within 14 calendar days if, while employed by the responsible entity, the applicant is formally charged with, is convicted of, or pleads guilty to a disqualifying offense.
 - The agreement shall provide that failure to make the notification may result in termination of the applicant's employment.

Regulation – OAC 5123:2-2-02



- Contains conflicting or confusing language.
- Notwithstanding rule 5123:2-2-01 of the Administrative Code, a responsible entity shall, at a frequency of no less than once every five years, check the databases specified in paragraph (C)(2) of this rule and request the bureau of criminal identification and investigation to conduct a criminal records check for each employee in a direct services position
 - Provider Certification rule requires background check at least once every 3 years for Superintendent and direct service employees.

Regulation – OAC 5123:2-2-02



- Establishes five tiers of disqualifying offenses with corresponding time periods that preclude an applicant from being employed or an employee from remaining employed by a responsible entity.
- Exclusion periods can change if the employee is convicted of multiple offenses contained in different tiers.

Regulation – OAC 5123:2-2-02



- No rehabilitation standards.
 - A conviction of or plea of guilty to a disqualifying offense shall not preclude an applicant from being employed or an employee from remaining employed by a responsible entity under limited circumstances:
 - ✦ (1) The applicant, employee, or candidate has been granted an unconditional pardon for the offense pursuant to R.C. Chapter 2967;

Regulation – OAC 5123:2-2-02



- ✦ (2) The applicant, employee, or candidate has been granted an unconditional pardon for the offense pursuant to an existing or former law of this state, any other state, or the United States, if the law is substantially equivalent to R.C. Chapter 2967;
- ✦ (3) The conviction or guilty plea has been overturned pursuant to law;
- ✦ (4) The applicant, employee, or candidate has been granted a conditional pardon for the offense pursuant to R.C. Chapter 2967 and the conditions under which the pardon was granted have been satisfied;

Regulation – OAC 5123:2-2-02



- ✦ (5) The conviction or guilty plea is not for a “permanent exclusion” offense and the applicant, employee, or candidate has a certificate of qualification for employment issued by a court of common pleas with competent jurisdiction pursuant to R.C. §2953.25; or
- ✦ (6) The conviction or guilty plea is not for a “permanent exclusion” offense and the applicant, employee, or candidate has a certificate of achievement and employability in a home and community-based services-related field, issued by the Ohio Department of Rehabilitation and Correction pursuant to R.C. §2961.22.

Regulation – OAC 5123:2-2-02



- Limited grandfathering clause.
 - May continue to employ a person who is excluded by 5-year exclusion offense if:
 - ✦ Conviction for tier 4 offense occurred prior to January 1, 2013;
 - ✦ Employee was hired prior to January 1, 2013; and
 - ✦ The responsible entity has considered the nature and seriousness of the offense and attests in writing to the character and fitness of the person based on the person's demonstrated work performance.
 - Written determination/attestation must be made by April 1, 2013 and maintained in employee's personnel record.
 - ✦ The determination shall be subject to review by the Department.

QUESTIONS?



THANKS FOR ATTENDING!