

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Employment First

Rule Number(s): 5123:2-2-05

Date: August 1, 2013

Rule Type:

☒ New

☐ Amended

☐ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language. *Please include the key provisions of the regulation as well as any proposed amendments.*

The Department is proposing new rule 5123:2-2-05 to implement Ohio's Employment First Policy. The Employment First Policy was established by [Executive Order 2012-05K](#) and is codified in Section 5123.022 of the Revised Code.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

5123.022

5123.04

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- 3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

If yes, please briefly explain the source and substance of the federal requirement.

The rule champions the federal Supreme Court's decision in [Olmstead v. L.C.](#), a ruling that requires states to eliminate unnecessary segregation of persons with disabilities and to ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs.

The federal Centers for Medicare and Medicaid Services (CMS) issued an [Informational Bulletin](#) on September 16, 2011 that highlighted the importance of competitive work for people with and without disabilities and CMS's goal to promote integrated employment options through the Medicaid Home and Community-Based Services waiver program. Home and Community-Based Services waivers administered by the Department are a major funder of employment services for Ohioans with developmental disabilities.

- 4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not applicable.

- 5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

To ensure that individuals with developmental disabilities have opportunities to be engaged in community employment (i.e., work in the competitive labor market in which payment is at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by persons without disabilities) that takes place in integrated settings (i.e., settings typically found in the community where persons with disabilities interact with persons without disabilities).

- 6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Success of the regulation will be measured in terms of the number of individuals with developmental disabilities engaged in community employment (i.e., competitive employment that takes place in integrated settings). Success will be achieved when the number increases.

Development of the Regulation

- 7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation. *If applicable, please include the date and medium by which the stakeholders were initially contacted.***

The following stakeholders participated in discussion regarding development of the rule and reviewed and provided comments on the draft rule prior to dissemination of the rule through the Department's official rules clearance process.

Employment First Taskforce (as established by [Executive Order 2012-05K](#)) comprised of representatives of:

- Ohio Department of Education
- Ohio Department of Job and Family Services
- Ohio Department of Medicaid
- Ohio Department of Mental Health
- Ohio Rehabilitation Services Commission

Employment First Advisory Committee comprised of representatives of:

- Advocacy and Protective Services, Inc.
- The Arc of Ohio
- Association of People Supporting Employment First
- Champaign Residential Services, Inc.
- CORE, Inc.
- Disability Rights Ohio
- Goodwill Columbus
- Governor's Office
- Griffin-Hammis Associates, LLC
- Hattie Larlham
- Havar, Inc.
- Kent State University
- Koinonia Homes
- Ohio Association of Adult Services
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Center for Autism and Low Incidence
- Ohio Department of Education
- Ohio Department of Job and Family Services
- Ohio Department of Medicaid
- Ohio Department of Mental Health
- Ohio Developmental Disabilities Council
- Ohio Disability Employment Alliance
- Ohio Provider Resource Association

- Ohio Rehabilitation Services Commission
- Ohio Self Determination Association
- Ohio SIBS (Special Initiatives by Brothers and Sisters)
- The Ohio State University Nisonger Center
- Ohio Superintendents of County Boards of Developmental Disabilities
- Ohio Valley Goodwill
- People First of Ohio
- University of Cincinnati, University Center for Excellence in Developmental Disabilities
- Welcome House, Inc.

During June 2013, Department staff discussed the draft rule with Superintendents of county boards of developmental disabilities. In July 2013, the draft rule was again shared with the Employment First Taskforce, the Employment First Advisory Committee, and Superintendents of Ohio's 88 county boards of developmental disabilities in advance of dissemination of the rule through the Department's official rules clearance.

Through the Department's official rules clearance, draft rules are sent to the following organizations:

- Advocacy and Protective Services, Inc.
- The Arc
- Autism Society of Ohio
- Councils of Governments
- Disability Housing Network
- Disability Rights Ohio
- Down Syndrome Association of Central Ohio
- The League
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Developmental Disabilities Council
- Ohio Health Care Association
- Ohio Provider Resource Association
- Ohio Self Determination Association
- Ohio SIBS (Special Initiatives by Brothers and Sisters)
- Ohio Superintendents of County Boards of Developmental Disabilities
- People First of Ohio
- Values and Faith Alliance

When draft rules are disseminated via the rules clearance process, they are simultaneously posted at the Department's [Rules Under Development](#) webpage.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

Stakeholders provided feedback regarding definitions of terms used in the rule (e.g., "community employment," "competitive employment," and "integrated setting"). Stakeholder feedback was considered and incorporated into definitions of terms in the rule as well as House Bill 59 of the 130th General Assembly.

Stakeholders suggested that the specific names of services funded through Medicaid Home and Community-Based Services waivers be incorporated into the rule. The service labels (i.e., "vocational habilitation," "supported employment-community," "supported employment-enclave," and "integrated employment") were included in paragraphs (B)(10) and (B)(12) of the rule.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

The Department reviewed available National Core Indicators data on employment of individuals with developmental disabilities to establish a baseline for implementation of the Employment First Policy. (The National Core Indicators is a collaborative effort of participating National Association of State Directors of Developmental Disability Services member state agencies and the Human Services Research Institute, with the goal of developing a systematic approach to performance and outcome measurement.) Data indicate that only 13 percent of working age Ohioans with developmental disabilities have jobs in the competitive workforce. Available data are not comprehensive and do not necessarily reflect the magnitude of the disparity between people with and without disabilities. Therefore, a requirement of this rule is that providers of employment services submit employment-related data to the Department.

Kent State University Professor Robert Cimera, a national expert on the costs and benefits of vocational programs for people with disabilities, found that supporting individuals in integrated employment is one-third the cost of services provided to individuals in segregated sheltered workshop settings when measured over a three-year period (Cimera, R.E. (2008). The cost-trends of supported versus sheltered employment. *Journal of Vocational Rehabilitation*, 28, 15-20.) Dr. Cimera's research also revealed that participation in sheltered workshops does not improve a person's employability and increases the cost of services a person requires to work in the community (Cimera, R.E. (2011). Do sheltered workshops prepare persons with disabilities for community employment? *Job Training and Placement Report*, 35(2), 1-3). It is anticipated that providing opportunities for individuals with developmental disabilities to obtain community employment will not only improve the quality of life for Ohioans but will ultimately yield a cost savings.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

The Department initially intended to incorporate the provisions of this rule into an existing rule. Representatives of county boards of developmental disabilities suggested that developing a new stand-alone rule was a better approach to broadly implement this critical initiative across the developmental disabilities system. The Department heeded this advice.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

No; the Employment First Taskforce established by [Executive Order 2012-05K](#) was charged with aligning policies, procedures, eligibility, and enrollment and planning for services with the objective of increasing opportunities for community employment for Ohioans with developmental disabilities. The Employment First Taskforce determined that setting a uniform process in administrative rule and establishing a point-in-time data collection system which captures information about all services provided were necessary to meet this charge.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

This is the first and only administrative rule that addresses the State of Ohio Employment First Policy. Department staff and stakeholders carefully considered existing statutes and rules to determine how the Policy could best be implemented in the context of existing regulations.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The Department is collaborating with members of the Employment First Advisory Committee, other state agencies, county boards of developmental disabilities, and providers of employment services to ensure that stakeholders are aware of and understand the Employment First Policy.

The Department and the Employment First Advisory Committee sponsored an inaugural Employment First conference on June 4 and 5, 2013 which was attended by approximately 475 people. The event offered a platform for Employment First partners to build a solid foundation to shift expectations and expand community employment opportunities statewide.

During 2013, Department staff members made numerous presentations that addressed the Employment First Policy and the proposed new rule to system stakeholders, including:

- February 19: Keynote presentation at the Agrability (opportunities for employment in agriculture) Conference
- March 27: Service and Support Administration Forum
- March 27: Employment First Futures Forum, Hamilton County Board of Developmental Disabilities
- April 11: Adams County Board of Developmental Disabilities
- April 17: Ohio Provider Resource Association Spring Conference
- May 7: Miami County Board of Developmental Disabilities
- May 24: Ohio Association of County Boards Serving People with Developmental Disabilities Spring Conference
- June 11: Lucas County Board of Developmental Disabilities
- June 12: CREST (residential services providers)
- June 17: Ohio Provider Resource Association

Information about the Employment First Policy and related events and activities is available at the [Ohio Employment First](#) website, the Department's [Employment First](#) webpage, and has been featured in the Department's [Pipeline](#) newsletter.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

The rule applies to providers responsible for planning, coordinating, or providing employment services to individuals with developmental disabilities. Based on provider claims for payment in 2012, it is estimated that 275 providers may be affected (i.e., the total number of providers that submitted claims for payment for the following Medicaid Home and Community-Based Services waiver services: Integrated Employment, Supported Employment-Community, Supported Employment-Enclave, and Vocational Habilitation). The number of affected providers may be less than 275 because some provide multiple services (e.g., Supported Employment-Enclave and Vocational Habilitation) and therefore were counted more than once.

Paragraph (F)(1) requires providers to submit semi-annual progress reports to the individual's team to demonstrate that the services provided are effectively helping the individual achieve community employment outcomes. It is already the case that providers participate as members of an individual's team when the individual's plan is developed or revised. Providers deliver services in accordance with the individual's plan. Providers are required to submit documentation of services in accordance with existing Department rules (in Chapter 5123:2-9 of the Administrative Code) governing Medicaid Home and Community-Based Services waiver services. It is expected that the new semi-annual progress reports required by the rule may be compiled from information that has already been collected in the course of providing the services; thus, this requirement will have little impact.

Paragraph (F)(2) requires providers to participate in the Department's data collection system to measure the effectiveness and efficiency of service delivery. This web-based system will be quick and easy for providers to use. The Institute on Outcome Analysis has been engaged to develop the data collection system and estimates that providers will be able to enter information about each individual they serve in less than three minutes. The impact on a provider, therefore, is minimal and will vary with the number of individuals the provider serves.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

Ohio's Employment First Policy is driving a shift in the culture of the developmental disabilities field. Historically, people with developmental disabilities have been placed in sheltered workshops or other segregated settings and have not been afforded an opportunity to obtain competitive employment.

Ohioans with developmental disabilities have the right to be engaged in meaningful community employment. Currently, only 13 percent of working age Ohioans with developmental disabilities have jobs in the competitive workforce. That leaves too many people in the margins, living below the poverty line and unable to make choices about how they live their lives. Independent living and employment often elude Ohioans with disabilities because support structures are not in place to help them know what jobs are available or to help them acquire skills needed to succeed. The assumption has often been made that competitive community employment is too difficult to obtain and therefore other, more easily-achievable alternatives are chosen.

Ohio can and must do better, not just for Ohioans with developmental disabilities, but for the communities and job-creators that are missing out on this valuable sector of the workforce. Programs will be realigned so that individuals have opportunities for real jobs that pay real wages to support an individual's life in his or her community.

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Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No. The rule applies to all providers of employment services.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

It is the policy of the Department to waive penalties for first-time or isolated paperwork or procedural regulatory noncompliance whenever appropriate. The Department believes the waiver of these penalties is appropriate under the following circumstances:

1. When failure to comply does not result in the misuse of state or federal funds;
2. When the regulation being violated, or the penalty being implemented, is not a regulation or penalty required by state or federal law; and
3. When the violation does not pose any actual or potential harm to public health or safety.

18. What resources are available to assist small businesses with compliance of the regulation?

Department staff of the Division of Policy and Strategic Direction, the Division of Medicaid Development and Administration, the Division of Legal Services, and the Office of Provider Standards and Review are available and routinely provide technical assistance to providers of services. Informational and instructional resources and materials related to the Employment First Policy are posted at the [Ohio Employment First](#) website and the Department's [Employment First](#) webpage and are disseminated via the Department's [Pipeline](#) newsletter.

The Employment First Advisory Committee recently formed a subcommittee to develop materials to ensure successful implementation of the Employment First Policy including identification of best practices, a model policy for county boards of developmental disabilities as required by paragraph (E)(1) of the rule, guidance for developing strategies and benchmarks for increasing community employment as required by paragraph (E)(2) of the rule, and strategies to communicate return on investment to local boards of developmental disabilities and other stakeholders.