

Secretary of State
Certificate and Order for Filing
TEMPORARY ADMINISTRATIVE RULES
A Statement of Need and Justification accompanies this form..

I certify that the attached copies* are true, full and correct copies of the TEMPORARY Rule(s) adopted on [3/31/2008] by the
Date prior to or same as filing date

Department of Human Services, Administrative Services Division and Director's Office 407
Agency and Division Administrative Rules Chapter Number

Jennifer Bittel 500 Summer St. NE, E-03, Salem, OR 97301 (503) 947-5250
Rules Coordinator Address Telephone

to become effective [March 31, 2008] through [September 26, 2008].
Date upon filing or later A maximum of 180 days including the effective date

RULE CAPTION

Criminal history checks for certain subject individuals; spousal home care workers added, voluntary informal appeal.
Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

List each rule number separately, 000-000-0000.
Secure approval of new rule numbers (Adopted rules) with the Administrative Rules Unit prior to filing

ADOPT: 407-007-0000, 407-007-0010, 407-007-0020, 407-007-0030, 407-007-0040, 407-007-0050, 407-007-0060, 407-007-0070, 407-007-0080, 407-007-0090

AMEND: 407-007-0210, 407-007-0270, 407-007-0330

Stat. Auth.: ORS 181.534, 181.537, 409.050, 678.153

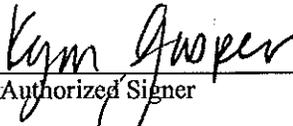
Other Auth.:

Stats. Implemented: ORS 181.534, 181.537, 678.153, 409.010

RULE SUMMARY

The Department of Human Services (DHS) currently conducts criminal history checks for all its employees, applicants or persons offered employment, volunteers, contractors, and most providers under OAR 407-007-0200 through 407-007-0380. DHS employees, volunteers under its direction and control, and certain contractors such as those working through DHS' Office of Information Services have potentially broader risk to DHS, DHS clients, and vulnerable persons, than do providers throughout Oregon. DHS employees also have different criminal history check and appeal conditions under collective bargaining agreements. Therefore, DHS is adopting new rules, OAR 407-007-0000 through 407-007-0090, specifically written for all its employees, applicants or persons offered employment, volunteers under DHS direction and control, and certain contractors.

OAR 407-007-0210, 407-007-0270, and 407-007-0330 are being amended to remove reference to subject individuals now covered by the newly adopted rules. OAR 407-007-0210 is being amended to correct a conflict with Seniors and People with Disabilities Division rules by removing the exclusion of spousal home care workers as subject individuals. OAR 407-007-0330 is being amended to remove the mandatory nature of informal administrative reviews. According to the Oregon Attorney General, a subject individual's right to hearing cannot be terminated due to failure to participate in the informal administrative review.


Authorized Signer

KYM GASPER
Printed name

3/31/2008
Date

*With this original and Statement of Need, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules. ARC 940-2005

STATEMENT OF NEED AND JUSTIFICATION

A Certificate and Order for Filing Temporary Administrative Rules accompanies this form.

Department of Human Services, Administrative Services Division and Director's Office

407

Agency and Division

Administrative Rules Chapter Number

In the Matter of:

The adoption of OAR 407-007-0000, 407-007-0010, 407-007-0020, 407-007-0030, 407-007-0040, 407-007-0050, 407-007-0060, 407-007-0070, 407-007-0080, and 407-007-0090; and the amendment of OAR 407-007-0210, 407-007-0270, and 407-007-0330.

Rule Caption: (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

Criminal history checks for certain subject individuals; spousal home care workers added, voluntary informal appeal.

Stat. Authority: ORS 181.534, 181.537, 409.050, 678.153

Other Authority:

Stats. Implemented: ORS 181.534, 181.537, 678.153, 409.010

Need for the Temporary Rule(s):

The Department of Human Services (DHS) currently conducts criminal history checks for all its employees, applicants or persons offered employment, volunteers, contractors, and most providers under OAR 407-007-0200 through 407-007-0380. DHS employees, volunteers under its direction and control, and certain contractors such as those working through DHS' Office of Information Services have potentially broader risk to DHS, DHS clients, and vulnerable persons, than do providers throughout Oregon. DHS employees also have different criminal history check and appeal conditions under collective bargaining agreements. Therefore, DHS is adopting new rules, OAR 407-007-0000 through 407-007-0090, specifically written for all its employees, applicants or persons offered employment, volunteers under DHS direction and control, and certain contractors.

OAR 407-007-0210, 407-007-0270, and 407-007-0330 are being amended to remove reference to subject individuals now covered by the newly adopted rules. OAR 407-007-0210 is being amended to correct a conflict with Seniors and People with Disabilities Division rules by removing the exclusion of spousal home care workers as subject individuals. OAR 407-007-0330 is being amended to remove the mandatory nature of informal administrative reviews. According to the Oregon Attorney General, a subject individual's right to hearing cannot be terminated due to failure to participate in the informal administrative review.

Documents Relied Upon, and where they are available:

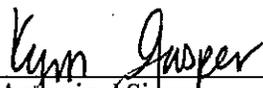
ORS 181.534, 181.537, OAR 407-007-0200 through 407-007-0380, correspondence between the Department of Human Services Criminal Records Unit and the Oregon Attorney General's Office. Please contact the rules coordinator if requesting documentation.

Justification of Temporary Rule(s):

Regarding the adoption of OAR 407-007-0000 through 407-007-0090: Certain subject individuals under DHS (employees, applicants or persons offered employment, volunteers under its direction and control, and certain contractors such as those working through DHS' Office of Information Services) have specific work and position considerations, contested case hearing considerations, and collective bargaining agreement requirements which are not being adequately addressed by the current rules. DHS finds that failure to act promptly will result in serious prejudice to the public interest, the Department, and the Department's clients and vulnerable persons. These rules need to be adopted promptly so that these considerations may be addressed immediately. If not adopted, some persons with serious criminal history might have to be approved because under current rules, the criteria for weighing potential risk is too narrow. For example, a person with serious violent behavior or history of property damage could be approved to work for the Department because the person's job has no direct or indirect contact with vulnerable persons. These newly adopted rules will allow for a much broader scope of job duties and access to sensitive information and materials to be considered while weighing whether a person is a potential risk to the Department, its clients, or vulnerable persons.

Regarding the amendment of OAR 407-007-0210 and OAR 407-007-0270, 407-007-0330: With the adoption of new criminal history check rules, the persons formerly subject to OAR 407-007-0200 et seq. must be removed. Inclusion of these persons in two sets of rules would be contradictory, confusing and present too great a burden on these persons and the Department. The temporary amendments will solve the discrepancies. In addition, spousal home care workers are specifically excluded in the current OAR 407-007-0210, but specifically included in the Seniors and People with Disabilities Division (SPD) rules on home care workers. The criminal history check rules should agree with SPD rules to avoid confusion or the possibility of spousal home care workers not being criminal history checked as required by SPD. If not checked, spouses with criminal history might have access to finances or other treatment-related situations which could be harmful to DHS clients. Amendment to the rule eliminates any confusion in the criminal history check requirements.

Regarding amendments to OAR 407-007-0330: If not immediately amended, persons appealing a criminal history check denial or restriction could have hearing rights terminated. A contested case hearing process is required by ORS 181.534 and 181.537. The immediate amendment to the rules would correct the mistake of terminating hearing rights.


Authorized Signer

KYM GASPER
Printed name

3/31/2008
Date

CHAPTER 407
DEPARTMENT OF HUMAN SERVICES,
ADMINISTRATIVE SERVICES DIVISION AND DIRECTOR'S OFFICE

DIVISION 7
CRIMINAL HISTORY CHECKS

Department Employees, Volunteers, and Contractors

407-007-0000

Purpose and Scope

- (1) Purpose. The purpose of these rules, OAR 407-007-0000 through 407-007-0090, is to provide for the screening under ORS 181.534 and 181.537 of the Department of Human Services' (Department) employees, volunteers, and contractors to determine if they have a history of criminal behavior such that they should not be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules.
- (2) Rule Applicability. These rules do not apply to subject individuals covered under OAR 407-007-0200 through 407-007-0380.

Stat. Auth.: ORS 181.534, 181.537, 409.050, 678.153

Stats. Implemented: ORS 181.534, 181.537, 678.153, 409.010

407-007-0010

Definitions

As used in OAR 407-007-0000 through 407-007-0090, unless the context of the rule requires otherwise, the following definitions apply:

- (1) "Approved" means that a subject individual, following a final fitness determination, is eligible to work, volunteer, be employed, or otherwise perform in positions covered by these rules.
- (2) "Client" means any individual who receives services, care, or funding for care, through the Department.
- (3) "Closed" or "Closed Case" means a criminal history check application for which a final fitness determination has not been completed.
- (4) "Criminal History Check" means obtaining and reviewing criminal history as required by these rules. The result of a criminal history check is a fitness determination or a closed case. The criminal history check includes any or all of the following:

- (a) An Oregon criminal history check, in which criminal offender information is obtained from Oregon Department of State Police (OSP) using the Law Enforcement Data System (LEDS). The Oregon criminal history check may also include a review of information from the Oregon Judicial Information Network (OJIN), Oregon Department of Corrections records, Oregon Department of Transportation Drivers and Motor Vehicles Division (DMV), local or regional criminal history information systems, or other official law enforcement agency or court records in Oregon.
 - (b) A national criminal history check, in which criminal history is obtained from the Federal Bureau of Investigation (FBI) through the use of fingerprint cards and other identifying information.
 - (c) A state-specific criminal history check, in which criminal history is obtained from law enforcement agencies, courts or other criminal history information resources located in, or regarding, a state or jurisdiction outside Oregon.
- (5) “Criminal Offender Information” means records, including fingerprints and photographs, received, compiled, and disseminated by OSP for purposes of identifying criminal offenders and alleged offenders and maintained as part of an individual’s records of arrest, the nature and disposition of criminal charges, sentencing, confinement (confinement shall not include the retention by OSP of records of transfer of inmates between penal institutions or other correctional facilities), and release, and includes the OSP computerized criminal history system.
 - (6) “Criminal Records Unit (CRU)” means the Department’s Criminal Records Unit.
 - (7) “Denied” means that a subject individual, following a fitness determination including a weighing test, is not eligible to work, volunteer, be employed, or otherwise perform in positions covered by these rules.
 - (8) “Department” means the Department of Human Services (DHS).
 - (9) “Employee” means an individual working in the Department in any position including a new hire, promotion, demotion, direct appointment, re-employment, job rotation, developmental assignment, transfer, or temporary hire.
 - (10) “Fitness Determination” means the outcome of an application and preliminary review, or an application and criminal history check including gathering of other information as necessary, in a case that is not closed.
 - (11) “Good Cause” means a valid and sufficient reason for not complying with time frames set during the criminal history check process or contested case hearing process, and may include an explanation of circumstances beyond an individual’s reasonable control.

- (12) “Other Criminal History Information” means information obtained and used in the criminal history check process that is not “criminal offender information” from OSP. “Other criminal history information” includes police investigations and records, justice records, court records, sexual offender registration records, warrants, DMV information, information provided on the Department’s criminal history check forms, and any other information from any jurisdiction obtained by or provided to the Department for the purpose of conducting a fitness determination.
- (13) “Restricted Approval” means an approval in which some restriction is made including but not limited to the subject individual, the subject individual’s environment, the type or number of clients for whom the subject individual may care, or the information to which the subject individual has access.
- (14) “Subject Individual” means an individual 16 years old or older from whom the Department may require fingerprints for the purpose of conducting a criminal history check. A subject individual includes any of the following:
- (a) An employee of the Department.
 - (b) An individual who has been offered employment by the Department.
 - (c) An individual secured by the Department through the services of a temporary employment agency, staffing agency, or personnel services agency who is providing any of the duties or having access as described in OAR 407-007-0060(1)(c).
 - (d) A volunteer or student over whom the Department has direction and control.
 - (e) A Department client who is placed in the work experience program at a Department site.
 - (f) Any individual who is required to complete a criminal history check pursuant to ORS 181.534 and 181.537 or the authority of these rules pursuant to a contract with the Department.
 - (g) Any individual applying for a paid or volunteer position, any employee, any volunteer, any contractor, or any employee of any contractor in a secure residential treatment facility, a state-operated rehabilitation facility, a state-operated group home within the Department’s State Operated Community Programs, Blue Mountain Recovery Center, Eastern Oregon Training Center, or Oregon State Hospital.
- (15) “Weighing Test” means a process carried out by the Department in which available information is considered to make the outcome of a preliminary or final fitness determination. A weighing test is only conducted when a subject individual has potentially disqualifying crimes or conditions.

Stat. Auth.: ORS 181.534, 181.537, 409.050
Stats. Implemented: ORS 181.534, 181.537

407-007-0020

Criminal History Check Required

- (1) Who Conducts Criminal History Check.
 - (a) The Department. The Department conducts criminal history checks on all subject individuals through LEDS maintained by OSP pursuant to ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
 - (b) OSP. If a nationwide criminal records check of a subject individual is necessary, OSP shall provide the Department results of a criminal records check conducted pursuant to ORS 181.534, including fingerprint identification, through the FBI.
- (2) When Criminal History Check Is Required (New Checks and Re-checks). A subject individual is required to have a check in the following circumstances:
 - (a) Subject Individuals. An individual becomes a subject individual on or after the effective date of these rules.
 - (b) Position Change. Except as provided in section (3) of this rule, the individual, whether previously considered a subject individual or not, changes positions, and the position requires a criminal history check. Movement into a position may be due but not limited to promotion, transfer, demotion, re-employment, job rotation, developmental assignment, restoration, bumping, or recall.
 - (c) Check Required by Regulation or Contract. A criminal history check is required by federal or state laws or regulations, other rules adopted by the Department, or by contract with the Department.
 - (d) Check is Justified. The Department has reason to believe that a criminal history check is justified. Examples include but are not limited to any indication of possible criminal behavior or quality assurance monitoring of a previously conducted criminal history check.
- (3) When Criminal History Check Is Not Required.
 - (a) Initial Review. The Department may determine that the completion of a new criminal history check for a Department employee is not required after the completion of the DHS Criminal History Request form when:
 - (A) The subject individual who has been offered a new position has completed a previous criminal history check with an outcome of approved; and

- (B) There has been no break in employment with the Department.
- (b) Criteria for Ending Check. The criminal history check process may be ended without a new criminal history check or new fitness determination if the Department determines there is no indication of new potentially disqualifying crimes or conditions, and at least one of the following is true:
 - (A) The previous criminal history check identified no potentially disqualifying crimes or conditions as defined at that time and the Department determines that the previous fitness determination is sufficient for the new position.
 - (B) The Department determines that the new position requires the same or less responsibility or access in the duties as described in OAR 407-007-0060(1)(c).
- (4) Reporting Criminal Activity Required. All subject individuals shall notify the Department's Office of Human Resources within five days of being arrested, charged, or convicted of any crime.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0030

Criminal History Check Process

- (1) Department Access. Only Department employees may be authorized and approved to receive and evaluate criminal offender information and other criminal history information. These employees are called authorized designees. Only authorized designees may conduct fitness determinations.
- (2) Forms Required. The subject individual shall use the Department's form to request the criminal history check. The DHS Criminal History Request form shall include the following:
 - (a) Identifying Information. Indication of what identifying information and other information the subject individual is required to provide in order to begin the criminal history check process, including but not limited to name, aliases, date of birth, address, recent residency information, drivers license, disclosure of criminal history, and disclosure of other information to be considered in the event of a weighing test;
 - (b) Notice Regarding Social Security number. A notice regarding disclosure of Social Security number indicating that:

- (A) The subject individual's disclosure is voluntary; and
 - (B) The Department requests the Social Security number solely for the purpose of positively identifying the subject individual during the criminal history check process.
 - (c) Fingerprinting. A notice that the subject individual is subject to fingerprinting and a criminal history check; and
 - (d) Change of Address. Direction to the subject individual to provide the Department with any change of address.
- (3) Positive Identification. The Department shall verify the identity of a subject individual which may include but is not limited to asking the subject individual for government-issued photo identification (example: driver's license) and confirming the information on the photo identification with the subject individual, the information written on the DHS Criminal History Request form, and the information written on the fingerprint card if a national criminal history check is conducted.
- (4) Oregon Criminal History Check.
- (a) Obtaining information. Using information submitted on the DHS Criminal History Request form, the Department obtains criminal offender information from the LEDS system and requests other criminal history information as needed.
 - (b) Handling of information. Criminal offender information obtained through LEDS shall be handled in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
- (5) National Criminal History Check.
- (a) Fingerprints Required. In addition to an Oregon criminal history check, a fingerprint-based national criminal history check is required by the Department under any of the following circumstances:
 - (A) The subject individual has out of state residency evidenced by the subject individual's possession of an out of state drivers' license or living outside Oregon for 60 or more consecutive days during the previous three years.
 - (B) The LEDS check, subject individual disclosures or any other criminal history information obtained by the Department indicates there may be criminal history outside of Oregon.
 - (C) The Department has reason to question the identity or history of the subject individual.

- (D) The subject individual is subject to these rules due to employment or position at Oregon state institutions under OAR 407-007-0010(14)(g).
 - (E) The subject individual is assigned duties involving any aspect of a criminal history check process or is a hearings representative in criminal history check contested cases.
 - (F) A fingerprint-based criminal history check is required by federal or state laws or regulations, other rules adopted by the Department, or by contract with the Department.
- (b) Fingerprints May Be Required. In addition to an Oregon criminal history check, the Department may require a fingerprint-based national criminal history check if the Department has reason to believe that fingerprints are needed to make a final fitness determination.
- (c) Processing of Fingerprint Card. The subject individual shall complete and submit a fingerprint card when requested by the Department.
- (A) The subject individual shall use a fingerprint card (example: FBI Form FD 258) provided by the Department. The Department shall give the subject individual notice regarding the Social Security number as set forth in OAR 407-007-0030.
 - (B) The subject individual shall submit the card within 21 days of the request to the Department's Criminal Records Unit.
 - (i) If the card is not received within 21 days, the Department will close the application.
 - (ii) The Department may extend the time allowed for good cause.
 - (C) The Department may require new fingerprint cards if previous cards are rejected by OSP or the FBI.
- (6) State-Specific Criminal History Check. The Department may also conduct a state-specific criminal history check in lieu of or in addition to a national criminal history check. Reasons for a state-specific criminal history check include but are not limited to:
- (a) Out-of-State History. When the Department has reason to believe that out-of-state criminal history may exist.
 - (b) Illegible Fingerprints. When the Department has been unable to complete a national criminal history check due to illegible fingerprints.

- (c) Incomplete Information. When the national criminal history check results show criminal history without final disposition or complete information about charges.
 - (d) State Not Included in FBI. When there is indication of residency or criminal history in a state that does not submit all criminal history to the FBI.
 - (e) Other Reasons. When, based on available information, the Department has reason to believe that a state-specific check is necessary.
- (7) Additional Information Required.
- (a) Required from Subject Individual. In order to complete a criminal history check and fitness determination, the Department may require additional information from the subject individual as necessary such as but not limited to additional criminal, judicial, or other background information; or proof of identity.
 - (b) Investigatory Interview. If a subject individual who is a represented Department employee is required to provide additional information, the process for obtaining that information through investigatory interviews shall adhere to collective bargaining agreements on investigatory interviews.
- (8) Imminent Danger.
- (a) New Criminal History Check. If the Department determines there is indication of criminal behavior by the subject individual that could pose a potential immediate risk to the Department, its clients or vulnerable persons, the Department shall authorize a criminal history check without the completion of a DHS Criminal History Request form.
 - (b) Opportunity to Disclose. If the Department determines that a fitness determination based on the criminal history check would be adverse to the subject individual, the Department shall provide the subject individual the opportunity to disclose criminal history and other information as indicated in OAR 407-007-0060 before the completion of the fitness determination.
- (9) Documentation. Criminal history checks conducted under this rule shall be documented in writing.

Stat. Auth.: ORS 181.534, 181.537, 409.050
Stats. Implemented: ORS 181.534, 181.537

407-007-0040
Potentially Disqualifying Crimes

- (1) Felonies and Misdemeanors. A conviction of any of the following crimes is potentially disqualifying. The list includes offenses that are crimes and does not include offenses or convictions that are classified as violations (see ORS 161.505 through 161.565).
 - (a) Any Federal Crime.
 - (b) Any U.S. Military Crime.
 - (c) Felonies and Misdemeanors in Oregon. Any felony or misdemeanor in Oregon Revised Statutes.
 - (d) Crimes Outside Oregon. Any felony or misdemeanor in a jurisdiction outside Oregon (including known crimes outside the United States) that is the substantial equivalent of any Oregon crime, or that is serious and demonstrates behavior that poses a threat or jeopardizes the safety of the Department, its clients, or vulnerable individuals as determined by the Department.
 - (e) Repealed Crimes. Any crime that is no longer codified in Oregon or other jurisdiction but that is the substantial equivalent of any crime listed in this section as determined by the Department.
- (2) Evaluation Based on Current Laws. Regardless of the conviction date, evaluations of crimes may be based on Oregon laws and laws in other jurisdictions in effect at the time of the fitness determination.
- (3) Juvenile Records. Under no circumstances may a subject individual be denied under these rules because of a juvenile record that has been expunged or set aside pursuant to ORS 419A.260 through 419A.262.
- (4) Adult Records. Under no circumstances may a subject individual be denied under these rules because of an adult record that has been set aside pursuant to ORS 137.225.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0050

Other Potentially Disqualifying Conditions

The following are potentially disqualifying conditions:

- (1) Sex Offender. The subject individual is a registered sex offender in any jurisdiction. There is a rebuttable presumption that an individual is likely to engage in conduct that would pose a significant risk to the Department, its clients, or vulnerable individuals if the subject individual has been designated a predatory sex offender as provided in ORS 181.585 or found to be a sexually violent dangerous offender under ORS 144.635 (or similar statutes in other jurisdictions).

- (2) Warrants. The subject individual has an outstanding warrant.
- (3) Probation, Parole, or Post-Prison Supervision. The subject individual is currently on probation, parole, or post-prison supervision for any crime, regardless of the original conviction date, as of the date the DHS Criminal History Request form was signed or the date the Department conducted a criminal history check due to imminent danger.
- (4) Parole or Probation Violation. The subject individual is found in violation of post-prison supervision, parole, or probation for any crime regardless of the original conviction date, within five years or less from the date the DHS Criminal History Request form was signed or the date the Department conducted a criminal history check due to imminent danger.
- (5) Juvenile Adjudication. Adjudication in a juvenile court, finding that the subject individual was responsible for a potentially disqualifying crime that would result in a conviction if committed by an adult.
- (6) Guilty Except For Insanity. A finding of “guilty except for insanity,” “guilty except by reason of insanity,” “not guilty by reason of insanity,” “responsible except for insanity,” or similarly worded disposition regarding a potentially disqualifying crime.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0060

Information Considered

- (1) Consideration of Other Information. If the subject individual has potentially disqualifying crimes or conditions, the Department shall consider any information disclosed by the subject individual or otherwise known when making the fitness determination. This information includes but is not limited to:
 - (a) Potentially disqualifying crimes or conditions. Circumstances regarding the nature of potentially disqualifying crimes and conditions. These may include but are not limited to:
 - (A) Age of the subject individual at time of the potentially disqualifying crime or condition.
 - (B) Details of incidents leading to the charges of potentially disqualifying crimes or resulting in potentially disqualifying conditions.
 - (C) Facts that support the conviction or other potentially disqualifying condition.

- (D) Passage of time since commission of the crime or potentially disqualifying condition.
- (E) Consideration of Oregon or federal laws, regulations, or rules covering the position or the Department in regards to the potentially disqualifying crimes or conditions.
- (b) Other Circumstances. The Department shall also consider other factors when relevant information is available including but not limited to:
 - (A) Other information related to criminal activity including charges, arrests, pending indictments, or convictions. Other behavior involving contact with law enforcement may also be reviewed if information is relevant to other criminal history or shows a pattern relevant to criminal history.
 - (B) Periods of incarceration.
 - (C) Status of and compliance with parole, post-prison supervision, or probation.
 - (D) Whether a conviction was set aside and the legal effect of the setting aside the conviction.
 - (E) Evidence of drug or alcohol issues directly related to criminal activity or potentially disqualifying conditions, including history of use, manufacturing, delivery, treatment, rehabilitation, and relapse.
 - (F) Evidence of other treatment or rehabilitation related to criminal activity, potentially disqualifying conditions or other factors listed in this rule. This includes but is not limited to assessments, evaluations or risk assessments before or after treatment or rehabilitation.
 - (G) Likelihood of repetition of criminal behavior or behaviors leading to potentially disqualifying conditions, including but not limited to patterns of criminal activity or behavior, or whether the subject individual appears to accept responsibility for past actions, as determined by the Department.
 - (H) Changes in circumstances subsequent to the criminal activity or disqualifying conditions.
 - (I) Information from Department protective services investigations pursuant to Chapter 444 Oregon Laws 2007.
 - (J) Education.
 - (K) Work history (employee or volunteer).

- (L) History regarding licensure, certification, or training for licensure or certification.
 - (M) Written recommendations from current or past employers.
 - (N) Indication that criminal history or record has been disclosed to the Department or other employers.
 - (O) Indication of the subject individual's cooperation, honesty, or the making of a false statement during the criminal history check process.
- (c) Relevancy of History to Position. The relevancy of the subject individual's criminal history or potentially disqualifying condition to the paid or volunteer position, or to the environment of the position, shall be considered. Consideration includes the relation between the subject individual's potentially disqualifying crimes or conditions and the following tasks or duties in the position:
- (A) Access to or direct contact with Department clients, client property, or client funds.
 - (B) Access to information technology services, or control over or access to information technology systems that would allow an individual holding the position to harm the information technology systems or the information contained in the systems.
 - (C) Access to information, the disclosure of which is prohibited by state or federal laws, rules or regulations, or information that is defined as confidential under state or federal laws, rules, or regulations.
 - (D) Access to payroll functions.
 - (E) Responsibility for receiving, receipting, or depositing money or negotiable instruments.
 - (F) Responsibility for billing, collections, or other financial transactions.
 - (G) Access to mail received or sent to the Department, including interagency mail, or access to any mail facilities in the Department.
 - (H) Responsibility for auditing the Department or other governmental agencies.
 - (I) Responsibility for any personnel or human resources functions.

- (J) Access to personal information about employees, clients, or members of the public including Social Security numbers, dates of birth, driver license numbers, residency information, medical information, personal financial information, criminal offender information, or other criminal history information.
 - (K) Access to medications, chemicals, or hazardous materials or access to facilities in which medications, chemicals and hazardous materials are present or access to information regarding the transportation of medications, chemicals, or hazardous materials.
 - (L) Access to property to which access is restricted in order to protect the health or safety of the public.
 - (M) Responsibility for security, design, or construction services. This relates to government buildings, grounds or facilities, or buildings, owned, leased, or rented for government purposes.
 - (N) Access to critical infrastructure or security-sensitive facilities or information.
- (2) Fitness Determination with Available Information. If the Department requests other information for the purpose of conducting a weighing test, and the subject individual does not respond in a stated time period, the Department shall make a fitness determination based on available information or close the case.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0070

Fitness Determinations

- (1) Preliminary Fitness Determination. A preliminary fitness determination is required to determine if a subject individual may work, volunteer, be employed, or otherwise perform in positions covered by these rules prior to a final fitness determination. The Department may not allow a subject individual to work, volunteer, or otherwise perform in positions covered by these rules prior to the completion of a preliminary fitness determination.
 - (a) DHS Criminal History Request Form Completed. The subject individual shall complete and submit a DHS Criminal History Request form.
 - (b) Preliminary Fitness Determination Required. The CRU shall complete a preliminary fitness determination and send notice to the hiring manager.

- (c) Preliminary Fitness Determination Outcomes. After review of the DHS Criminal History Request form, the CRU shall make one of the following determinations:
- (A) Hired on a Preliminary Basis. A subject individual may be hired or accepted into a position on a preliminary basis and allowed to participate in the training for, orientation to, and work activities of volunteering, employment, or other positions covered by these rules. The term “hired on a preliminary basis” is applicable only during the timeframe prior to a final fitness determination.
- (i) If there is no indication of a potentially disqualifying crime or condition on the DHS Criminal History Request form and the Department has no reason to believe the subject individual has potentially disqualifying history, the subject individual may be hired on a preliminary basis.
- (ii) When a subject individual discloses convictions or arrests for a potentially disqualifying crime, or any other potentially disqualifying condition, the individual may be hired on a preliminary basis only after the completion of a weighing test. A subject individual may be hired on a preliminary basis only if, based on information available at the time, the Department determines that more likely than not that the subject individual poses no potential threat to the Department, its clients, or vulnerable persons.
- (B) No hiring allowed. When a subject individual discloses a conviction or arrest for a potentially disqualifying crime or any other potentially disqualifying condition the Department shall conduct a weighing test. The Department may not hire on a preliminary basis if the Department determines that:
- (i) The subject individual may pose a potential threat to the Department, its clients, or vulnerable persons;
- (ii) There is not enough available information to determine the level of potential threat posed by the subject individual;
- (iii) The subject individual has previously been denied under these rules or other Department criminal history check rules; or
- (iv) The subject individual is currently involved in contesting a criminal history check under these or other Department criminal history check rules.

- (d) Active Supervision while Hired on a Preliminary Basis. A subject individual who is hired on a preliminary basis shall be actively supervised at all times by an individual who has been approved without restrictions pursuant to these rules or previous Department criminal history check rules.
 - (A) At all times the individual providing active supervision shall do all of the following:
 - (i) Be in the same building as the subject individual or, if outdoors, be within line of sight or hearing of the subject individual;
 - (ii) Know where the subject individual is and what the subject individual is doing; and
 - (iii) Periodically observe the actions of the subject individual.
 - (B) A subject individual who was approved without restrictions within the previous 24 months through a documented criminal history check pursuant to these rules or other DHS criminal history check rules may work after being hired on a preliminary basis without active supervision. The 24 month time frame is calculated from the date of previous approval to the date starting the new position. This exemption is not allowed in any of the following situations:
 - (i) If the subject individual cannot provide documented proof that he or she worked continuously under the previous approval for at least one year.
 - (ii) If there is evidence of criminal activity within the previous 24 months.
 - (ii) If, as determined by the Department, the job duties in the new position are so substantially different from the previous position that the previous fitness determination is inadequate for the current position.
- (e) Revocation.
 - (A) The Department may immediately remove a subject individual hired on a preliminary basis for the following reasons:
 - (i) There is any indication of falsification of the application.
 - (ii) The subject individual fails to disclose convictions for any potentially disqualifying crimes, any arrests that did not result in convictions, or any out of state arrests or convictions.

- (iii) The Department determines that allowing the subject individual to be hired on a preliminary basis is not appropriate, based on the application, criminal history, position duties, or regulations regarding the position.
 - (B) Revocation pursuant to this section is not subject to hearing or appeal.
 - (f) Hiring or Placement Not Required. Nothing in this rule is intended to require that a subject individual, who is eligible for being hired on a preliminary basis be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules prior to a final fitness determination.
- (2) Final Fitness Determination. The Department shall conduct a final fitness determination after all necessary criminal history checks have been completed. The Department may obtain and consider additional information as necessary to complete the final fitness determination.
- (a) Final Fitness Determination Outcomes.
 - (A) Approved. The Department may approve a subject individual if:
 - (i) The subject individual has no potentially disqualifying crimes or potentially disqualifying conditions; or
 - (ii) The subject individual has potentially disqualifying crimes or potentially disqualifying conditions and, after a weighing test, the Department determines that more likely than not that the subject individual poses no risk to the Department, its clients, or vulnerable persons.
 - (B) Approved with Restrictions. The Department may approve a subject individual with restrictions if it determines that more likely than not that the subject individual poses no risk to the Department, its clients, or vulnerable persons, if certain restrictions are placed on the subject individual, such as but not limited to restrictions to one or more specific clients, job duties, or environments. The Department shall complete a new criminal history check and fitness determination on the subject individual before removing a restriction. A fitness determination of approved with restrictions shall only be considered for the following subject individuals:
 - (i) An individual secured by the Department through the services of a temporary employment agency, staffing agency, or personnel services agency who is providing any of the duties or having access as described in OAR 407-007-0060(1)(c).

- (ii) A volunteer or student over whom the Department has direction and control.
 - (iii) A Department client who is placed in a work experience program at a Department site.
 - (iv) Any individual who is required to complete a criminal history check pursuant to the statutory authority of ORS 181.534 and 181.537 or the authority of these rules pursuant to a contract with the Department.
 - (C) Denied. The Department shall deny a subject individual whom it determines, after a weighing test, more likely than not poses a risk to the Department, its clients, or vulnerable individuals.
 - (d) Fitness Determination by the CRU. The CRU may assist in or handle final fitness determinations as requested by Department staff.
- (3) Closed Case.
- (a) Incomplete Application. If the subject individual discontinues the application or fails to cooperate with the criminal history check process, the application is considered incomplete and will be closed. Discontinuance or failure to cooperate includes, but is not limited to the following circumstances:
 - (A) The subject individual refuses to be fingerprinted when required by these rules.
 - (B) The subject individual fails to respond within a stated period of time to a request for corrections to the application, fingerprints or provide any other information necessary to conduct a criminal history check and there is not enough information available to make a fitness determination.
 - (C) The subject individual withdraws the application, leaves the position prior to completion of the check, or cannot be located or contacted by the Department.
 - (D) The subject individual is determined to be ineligible for the position for reasons other than the criminal history check.
 - (b) No Hearing Rights. When the application is closed without a final fitness determination, there is no right to contesting the closure.
- (4) Notice to Subject Individual. Upon completion of a final fitness determination resulting in denied or approved with restrictions, the Department shall provide written notice to the subject individual.

- (a) Notice of Fitness Determination. The notice shall:
 - (A) Be in a Department approved format;
 - (B) Include information regarding appeal rights and the notice becoming a final order in the event of a withdrawal or of failure to appear at the hearing; and
 - (C) Be mailed or hand-delivered to the subject individual as soon as possible, but no later than 14 calendar days after the decision. The date of the decision shall be recorded on the form.
 - (b) Other Documents. The Department shall also provide employees with all formal disciplinary documents and letters up to and including a letter of dismissal.
- (5) Termination Following Denial or Closed Case. When a subject individual is denied or a case is closed, the individual shall not be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules. A denial or closed case applies only to the position and application in question.
- (a) Dismissal or Discharge of Employees. The process for a Department employee's removal from service or dismissal shall adhere to Department-wide Support Services policies on discharge, Department of Administrative Services Human Resource Services Division polices on dismissal, and collective bargaining agreements on discharge, as applicable.
 - (b) Dismissal of all Other Subject Individuals. For all other subject individuals, a denial or closed case shall result in immediate dismissal.
- (6) Documentation. Preliminary and final fitness determinations shall be documented in writing, including any details as needed such as but not limited to the restrictions in a restricted approval, the potentially disqualifying crimes or convictions in a denial, or the reasons for a closed case.
- (7) No Binding Precedent. The Department shall make new fitness determinations for each application. The outcome of previous fitness determinations do not ensure the same outcome of a new fitness determination.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0080

Contesting a Final Fitness Determination

- (1) Fitness Determinations to Contest. A final fitness determination of denied or approved with restrictions is considered an adverse outcome. A subject individual with an adverse outcome may contest that outcome.
- (2) Work Pending Appeal Prohibited. If a subject individual is denied, then the individual may not work, volunteer, be employed, or otherwise perform in positions covered by these rules. A subject individual appealing a restricted approval may only work under the terms of the restriction during the appeal.
- (3) Employment Not Guaranteed. If an adverse outcome is changed at any time during the appeal process, such change does not guarantee employment or placement.
- (4) History Disputed.
 - (a) Correcting Disputed History. If a subject individual wishes to challenge the accuracy or completeness of criminal offender information provided by OSP, the FBI, or other criminal history information from other agencies reporting information to the Department, the subject individual may appeal to the entity providing the information. Such challenges are not subject to the Department's appeal process.
 - (b) Disputed and Undisputed History. If a subject individual is disputing some criminal history and challenging a final fitness determination on other undisputed criminal history, no new fitness determination can be completed until the issue of the disputed history is resolved, and documentation of the resolution is provided to the Department.
- (5) Legal Representation. The subject individual has the right to represent himself or herself or have a legal representative during the appeal process. The subject individual may not be represented by a lay person. In this rule, the term "subject individual" shall be considered to include the subject individual's legal representative.
- (6) Challenging the Fitness Determination. A subject individual who wishes to challenge an adverse fitness determination may appeal the determination by requesting a contested case hearing. The appeal process is conducted pursuant to ORS 183.411 through 183.497 and the Attorney General's Uniform and Model Rules of Procedure for the Office of Administrative Hearings (OAH), OAR 137-003-0501 through 137-003-0700.
 - (a) Appeal. To request a contested case hearing the subject individual shall complete and sign the DHS Hearing Request form. The form is provided with a notice of fitness determination and is also available by contacting the CRU.
 - (b) Deadline for Appeal. The completed and signed form must be received by the Department:

- (A) For Department employees, no later than 15 calendar days after the date of signature on the notice of the fitness determination.
 - (B) For all other subject individuals, no later than 45 calendar days after the date of signature on the notice of the fitness determination.
 - (c) Untimely Appeal. In the event a request for an appeal is not timely, the Department will determine, based on a written statement from the subject individual and available information, if there is good cause to proceed with the appeal.
 - (d) Hearing on Timeliness. The Department may refer an untimely request to the OAH for a hearing on the issue of timeliness.
- (7) Criminal History Check. The Department may conduct additional criminal history checks during the appeal process to update or verify the subject individual's criminal history.
- (8) Withdrawal. The subject individual may withdraw a hearing request verbally or in writing at any time. The withdrawal is effective the date it is received by the Department or the OAH. The subject individual may cancel the withdrawal in writing up to 14 calendar days after the date of withdrawal.
- (9) Contested Case Hearing.
- (a) Procedural Documents and Exhibits. The Department shall provide to the administrative law judge and the subject individual a complete copy of available information. The notice of contested case and prehearing summary shall be mailed by certified mail through the U.S. Postal Service. All other documents shall be mailed by regular first class mail.
 - (b) Public Attendance. The contested case hearing is not open to the public.
 - (c) New Fitness Determination. The administrative law judge shall make a new fitness determination based on the evidence and the contested case hearing record.
- (10) Proposed and Final Orders.
- (a) Notice of Fitness Determination as Final Order. In the following situations, the notice of fitness determination issued is final as if the subject individual never requested a hearing:
 - (A) Failure to request a hearing in the time allotted in this rule. No other document will be issued after the notice of fitness determination.
 - (B) Withdrawal of the request for hearing at any time during the appeal process.

- (b) Informal Disposition. The Department may make an informal disposition based on review of available information and discussion with the subject individual. The Department shall issue a final order and new notice of fitness determination.
- (c) Dismissal Order. A hearing request is dismissed when the subject individual fails to appear at the time and place specified for the contested case hearing. The order is effective on the date scheduled for the hearing. The Department shall review a request to cancel the dismissal for good cause if received in writing within 14 calendar days from the date of the dismissal order.
- (d) Order after Hearing. After a hearing, the administrative law judge shall issue a proposed and final order.
 - (A) If no written exceptions are received by the Department within 14 calendar days after the service of the proposed and final order, the proposed and final order shall become the final order.
 - (B) If timely written exceptions to the proposed and final order are received by the Department, the Department Director or the Director's designee shall consider the exceptions and serve a final order, or request a revised proposed and final order from the administrative law judge.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537, 183.341

407-007-0090

Record Keeping, Confidentiality

- (1) LEDS Reports. All LEDS reports are confidential and shall be maintained by the Department in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
 - (a) LEDS Access. LEDS reports are confidential and may only be shared with approved Department employees if there is a need to know consistent with these rules.
 - (b) Subject Individual Access. The LEDS report, and photocopies of the LEDS report, may not be shown or given to the subject individual.
- (2) National (FBI) Information. The results of a national criminal history check provided by the FBI or through OSP are confidential and may not be disseminated by the Department, with the following exceptions:

- (a) Subject Individual Request. If a fingerprint-based criminal history check was conducted on the subject individual, the subject individual shall be provided a copy of the results if requested.
 - (b) Contested Case Hearing Exhibits. If authorized by the subject individual, the results of the national criminal history check shall be provided as exhibits during the contested case hearing.
- (3) Department Forms and Other Documentation. All completed DHS Criminal History Request forms, other criminal history information and other records collected or developed during the criminal history check process shall be kept confidential and disseminated only on a need-to-know basis.
- (4) Retention. All criminal history check documents shall be retained and destroyed pursuant to federal law and records retention schedules published by Oregon State Archives.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

CHAPTER 407
DEPARTMENT OF HUMAN SERVICES,
ADMINISTRATIVE SERVICES DIVISION AND DIRECTOR'S OFFICE

DIVISION 7
CRIMINAL HISTORY CHECKS

Providers

407-007-0210

Definitions

As used in OAR chapter 407, division 007, unless the context of the rule requires otherwise, the following definitions apply:

- (1) "Adult Foster Home" has the same definition as is provided in ORS 443.705.
- (2) "Approved" means that a subject individual has completed the criminal history check process, including any required fitness determination, and is eligible to provide care or reside in an environment covered by these rules.
- (3) "Authorized Designee" means a person who is designated by an approved qualified entity and authorized by the Department to receive and process criminal history check request forms from subject individuals and criminal history information from the Department. The authorized designee conducts fitness determinations under the authority of the Department.
- (4) "Care" means the provision of care, treatment, education, training, instruction, supervision, placement services, transportation, recreation or support to children, the elderly or persons with disabilities.
- (5) "Client" means any person who receives care, or funding for care, through the Department.
- (6) "Contact Person" means a person who is designated by an approved qualified entity to receive and process criminal history check request forms from subject individuals, but who is not authorized to receive criminal history information from the Department. The contact person is not allowed to make final fitness determinations. The contact person is allowed to make the preliminary fitness determinations under the authority of the Department only if there is no indication of potentially disqualifying crimes or conditions.
- (7) "Conviction" means that the subject individual was convicted in a court of law, or was adjudicated in a juvenile court and found responsible for the crime. "Conviction" as used in these rules includes a finding of "guilty except by reason of insanity," "guilty except

for insanity," "not guilty by reason of insanity," or similarly worded findings. Entering a plea of "guilty" or "no contest" is also considered a conviction for the purpose of these rules unless a subsequent court decision has dismissed the charges.

- (8) "Criminal History Check Rules" or "These Rules" means OAR chapter 407, division 007.
- (9) "Criminal History Check" or "CHC" means the Oregon Criminal History Check and when required, a National Criminal History Check and/or a State-Specific Criminal History Check, and the processes and procedures required by these rules.
- (10) "Criminal History Information" means criminal justice records, fingerprints, court records, sexual offender registration records, warrants, DMV information, information provided on the Department's criminal history check forms, and any other information obtained by or provided to the Department pursuant to these rules for the purpose of conducting a fitness determination. "Criminal history information" does not include violations or infractions (See ORS 161.505-161.585).
- (11) "Denied" means that a subject individual following a fitness determination, including a weighing test, has been found to be not eligible to hold the position, be employed, certified, licensed, registered or otherwise authorized by the Department to provide care or to reside in an environment covered by these rules.
- (12) "Department" means the Oregon Department of Human Services or any subdivision thereof.
- (13) "Employer," if the qualified entity is a corporation, means the corporation or parent corporation.
- (14) "Facility" means any entity that is licensed or certified by the Department and which provides care.
- (15) "Homecare Worker" or "Home Care Worker" means a provider who is enrolled in the Department's client-employed provider program and who provides either hourly or live-in services, as defined in ORS 410.600.
- (16) "Independent Provider" means a person who meets the qualifications described in OAR 411-305-0020, 411-330-0020 or 411-340-0020.
- (17) "National Criminal History Check" means obtaining and reviewing criminal history outside Oregon's borders. This information may be obtained from the Federal Bureau of Investigation through the use of fingerprint cards and from other criminal information resources.
- (18) "Oregon Criminal History Check" means obtaining and reviewing information from the Oregon State Police's Law Enforcement Data System (LEDS). The Oregon Criminal History Check may also include a review of information from the Oregon Judicial

Information Network (OJIN), Oregon Department of Corrections records, Motor Vehicles Division, local or regional criminal history information systems, or other official law enforcement agency or court records in Oregon.

- (19) "Personal Care Services Provider" means a person who is directly employed by a client of the Department to provide assistance with activities of daily living and other activities as described in OAR chapter 411, division 34.
- (20) "Potentially Disqualifying Crime" means a crime listed in OAR 407-007-0280.
- (21) "Probationary Status" means a condition in which a subject individual may be allowed by the authorized designee to work, volunteer, be trained or reside in an environment covered by these rules following submission of a completed DHS Criminal History Request form. The term "probationary status" is applicable only during the timeframe prior to a final fitness determination.
- (22) "Qualified Entity" means the Department; local government agency; community mental health or developmental disability program, local health department or an individual or business or organization, whether public, private, for-profit, nonprofit or voluntary, that provides care, including a business or organization that licenses, certifies or registers others to provide care.
- (23) "Qualified Vendor" means a supplier of criminal history information who is approved by the Department of Human Services as having access to substantially the same criminal offender information as the Law Enforcement Data System.
- (24) "Related" means spouse, domestic partner, natural parent, child, sibling, adopted child, adopted parent, stepparent, stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, grandparent, grandchild, aunt, uncle, niece, nephew or first cousin.
- (25) "Service Provider" means a person or entity that is licensed, certified, registered, or otherwise regulated or authorized for payment by the Department and that provides care.
- (26) "State-Specific Criminal History Check" means obtaining and reviewing information from law enforcement agencies, courts or other criminal history information resources located in a state or jurisdiction outside Oregon.
- (27) "Subject Individual" means a person who is required to complete a criminal history check pursuant to these rules.
 - (a) "Subject individual" includes:
 - (A) ~~An employee of the Department, person who has been offered employment by the Department, volunteer or student over whom the Department has direction and control.~~

- (B) A person who is licensed, certified, registered or otherwise regulated or authorized for payment by the Department and who provides care.
- (EB) An employee or volunteer who provides care within any entity or agency licensed, certified, registered or otherwise regulated by the Department.
- (DC) A direct care staff person secured through the services of a personnel services or staffing agency who works in any long term care facility licensed by the Department pursuant to ORS chapter 441.
- (ED) Except as provided in paragraphs (27)(b)(C) and (D) of this rule, a person who lives in a facility that is licensed, certified, registered or otherwise regulated by the Department to provide care.
- (FE) An individual working for a private, licensed child caring agency or system of care contractors providing child welfare services pursuant to ORS chapter 418.
- (GF) A homecare worker, personal care services provider or an independent provider employed by a Department client and who provides services to the client if the Department helps to pay for the services.
- (HG) A child care provider reimbursed through the Department's child care program, and employees and other persons in child care facilities that are exempt from certification or registration by the Child Care Division of the Employment Department. This includes all persons who reside in or who are frequent visitors to the residence or facility where the child care services are provided and who may have unsupervised access to the children. (REF: OAR chapter 461, division 165.)
- (HH) A contact person or authorized designee as defined in OAR 407-007-0210.
- (JI) A person providing training to staff within a long term care facility.
- (KJ) Any person serving as an owner, operator or manager of a room and board facility pursuant to OAR chapter 411, division 68.
- (L) ~~Any person applying for a paid or volunteer position, any employee, any volunteer, any contractor, or any employee of any contractor of a State-operated group home within the Department's State-Operated Community Programs, Blue Mountain Recovery Center, Eastern Oregon Training Center, and Oregon State Hospital.~~
- (MK) Notwithstanding subsection (27)(b) of this rule, any person who is required to complete a criminal history check pursuant to a contract or

written agreement with the Department or by other Oregon Administrative Rules of the Department, if the requirement is within the statutory authority granted to the Department. Specific statutory and rule authority must be specified in the contract.

- (b) "Subject Individual" does not include:
- (A) Any person under 16 years of age.
 - (B) A person receiving training in a DHS-licensed facility as a part of the required curriculum through any college, university or other training program and who is not an employee in the facility in which training is provided. Facilities must ensure that all such students have passed a substantially equivalent background check process through the training program or are:
 - (i) Actively supervised at all times as defined in OAR 407-007-0310, and
 - (ii) Not allowed to have unsupervised access to vulnerable people.
 - (C) Residents of facilities licensed, certified or registered by the Department who are receiving care or treatment, unless specific, written permission to conduct a criminal history check is received from the Department. The only circumstance in which the Department will allow a check to be performed on a client pursuant to this paragraph is if the client falls within the definition of "subject individual" as listed in subsection (27)(a) of this rule.
 - (D) Persons who live in or visit relative adult foster homes. This exemption does not apply to the licensee.
 - (E) Individuals working in child care facilities certified or registered by the Employment Department.
 - (F) Individuals ~~receiving spousal pay from the Department for care of a spouse.~~
 - (G) ~~Individuals~~ employed by a private business that provides services to clients and the general public and that is not regulated by the Department.
 - (HG) Individuals employed by a business that provides appliance repair or structural repair to clients and the general public, and who are temporarily providing such services in an environment regulated by the Department. This exclusion does not apply to a business that receives funds from the Department for care provided by an employee of the business.

- (~~H~~) Individuals employed by a private business in which a client of the Department is working as part of an employment service program sponsored by the Department. This exclusion does not apply to an employee of a business that receives funds from the Department for care provided by the employee.
- (~~I~~) Employees and volunteers working in hospitals, ambulatory surgical centers, special inpatient care facilities, outpatient renal dialysis facilities, and freestanding birthing centers as defined in ORS 442.015, in-home care agencies as defined on ORS 443.305, and home health agencies as defined in ORS 443.005. This exclusion does not apply to subject individuals in State-operated group homes within the Department's State-Operated Community Programs, Blue Mountain Recovery Center, Eastern Oregon Training Center, or Oregon State Hospital as defined in subsection (27)(a) of this rule.
- (~~K~~J) Volunteers who are not under the direction and control of the Department or any entity licensed, certified, registered or otherwise regulated by the Department.
- (~~L~~K) Individuals employed or volunteering in a Medicare-certified health care business which is not subject to licensure or certification by the State of Oregon.
- (~~M~~L) People working in restaurants or at public swimming pools.
- (~~N~~M) Hemodialysis technicians.
- (~~O~~N) Individuals employed by Alcohol and Drug Programs that are certified, licensed, or approved by the Office of Mental Health and Addictions Services to provide Prevention, Evaluation or Treatment Services. This exclusion does not apply to programs specifically required by other Department rules to conduct criminal history checks in accordance with these rules.
- (~~P~~O) Persons working for a transit service provider which conducts background checks pursuant to ORS 267.237.
- (~~Q~~P) Persons being certified by the Department as interpreters pursuant to ORS 409.623. This paragraph is not intended to exempt a Department-certified interpreter from a criminal history check when being considered for a specific position.

- | (RQ) Provider group categories that were authorized for payment by the Department for care if such provider group categories were not covered by a Department criminal record check process prior to 2004.
- | (SR) Foster and adoptive parents providing care for children pursuant to ORS chapter 418.
- | (TS) Emergency Medical Technicians and First Responders certified by the Department of Human Services Emergency Medical Services and Trauma Systems program.
- | (UT) A person employed by an entity that provides services solely contracted under ORS 414.022.

(28) "Weighing Test" means a process carried out by one or more authorized designees in which known negative and positive information is considered to determine if a subject individual is approved or denied. See OAR 407-007-0320(5)(c).

| Stat. Auth.: ORS 181.537, 409.010-~~&~~, 409.050
Stats. Implemented: ORS 181.537

407-007-0270
National Criminal History Check Process

- (1) National Criminal History Check. In addition to an Oregon check (OAR 407-007-0250), a national criminal history check may be required by the Department under any of the following circumstances:
 - (a) Out-of-State Residency. The subject individual has lived outside Oregon for 60 or more consecutive days during the previous three (3) years with the following exceptions:
 - (A) Child Care Providers (18 months). The subject individual is a child care provider or other person included in OAR 407-007-0210(27)(a)(H) who has lived outside Oregon for 60 or more consecutive days during the previous eighteen months.
 - (B) Child Welfare System (5 years). The subject individual is working for private, licensed child caring agencies and system of care contractors providing child care pursuant to ORS chapter 418 and has lived outside Oregon for 60 or more consecutive days during the previous five years.
 - (b) Criminal History Outside Oregon. The LEDS check, or any other information obtained by the Department, indicates there may be criminal history outside of Oregon, or the subject individual self-discloses criminal history outside of Oregon.

- (c) Identity or History Questioned. The social security number appears not to be valid or is not provided to the Department on the DHS Criminal History Request form, the subject individual has no Oregon driver's license or Oregon identification card, or the Department has other reason to question the identity or history of the subject individual.
- (d) ~~Oregon State Institutions. The subject individual meets the definition under OAR 407-007-0210(27)(a)(L).~~
- (2) Fingerprinting a Juvenile. Consent of the parent or guardian is required to obtain fingerprints from a child under the age of 18 years.
- (3) Processing. The subject individual must complete and submit a fingerprint card when requested by the Department.
 - (a) Fingerprint Cards. The subject individual must use a fingerprint card (Example: FBI Form FD 258) provided by the Department.
 - (b) Time Frame for Return. The card must be submitted within 21 days of the request to the Department's Criminal Records Unit to avoid closure of application pursuant to OAR 407-007-0320(5)(e).
 - (c) Extension. The Department may extend the time allowed for good cause.
- (4) Additional Information Required. In order to conduct a national check and complete a fitness determination, the Department or the authorized designee may require additional information from the subject individual as necessary, such as but not limited to proof of identity; residential history; names used while living at each residence; or additional criminal, judicial, or other background information.
- (5) Department Makes Final Fitness Determination. When a subject individual has a potentially disqualifying national criminal history or discloses potentially disqualifying out of state criminal history, the Department makes the final fitness determination.

Stat. Auth.: ORS 181.537, 409.010-~~2~~, 409.050
Stats. Implemented: ORS 181.537

407-007-0330
Contesting a Fitness Determination

- (1) Work Pending Appeal Prohibited. If a subject individual is denied, then that person may not hold the position, provide services or be employed, licensed, certified or registered.
- (2) History Disputed.

- (a) Correcting Disputed History. If a subject individual wishes to challenge the accuracy or completeness of information provided by the Oregon State Police, the Federal Bureau of Investigation or other agencies reporting information to the Department, the subject individual may appeal to the entity providing the information. Such challenges are not subject to the Department's appeal process described in this rule.
 - (b) Request for Re-Evaluation Following Correction. If the subject individual successfully contests the accuracy or completeness of information provided by the Oregon State Police, the Federal Bureau of Investigation or other agency reporting information to the Department, the Department will conduct a new criminal history check and re-evaluate the criminal history upon submission of a new criminal history request form.
- (3) Challenging the Fitness Determination. If a subject individual wishes to dispute an adverse fitness determination, the subject individual may appeal the determination by requesting a contested case hearing. The subject individual must be notified of the opportunity for appeal on a form available from the Department.
- (a) Appeal. In order to request a contested case hearing the subject individual or the subject individual's legal representative must complete and sign the hearing request form. The form is available by contacting the DHS Criminal Records Unit.
 - (b) Deadline for Appeal. The completed and signed form must be received by the Department not later than:
 - (A) ~~10 days after the notice of the fitness determination is mailed for subject individuals who are employees, applicants, and volunteers of the Department (subject individuals under OAR 407-007-0210(27)(a)(A) and 407-007-0210(27)(a)(L)).~~
 - (B) 45 days after the notice of the fitness determination is ~~mailed for all other subject individual~~signed.
 - (c) Extension of Deadline. The Department may extend the time to appeal if the Department determines the delay was caused by factors beyond the reasonable control of the subject individual.
 - (d) Hearing on timeliness. The Department may refer an untimely request to the Office of Administrative Hearings for a hearing on the issue of timeliness.
- (4) Informal Administrative Review ~~(Mandatory)~~. When a subject individual is denied and the subject individual, or the subject individual's legal representative, requests a contested case hearing, the Department ~~conducts~~may conduct an informal administrative review before referring the appeal to the Office of Administrative Hearings.

- (a) Participation by Subject Individual. The subject individual and, if applicable, the subject individual's legal representative, ~~must~~may participate in the informal administrative review.
 - (A) Participation may include, but is not limited to:
 - (i) Providing fingerprint cards, if not previously provided, for the purpose of a national check pursuant to OAR 407-007-0270 or to confirm identity.
 - (ii) Providing additional information or additional documents.
 - (iii) Participating in a telephone conference.
 - (B) Failure to participate in the informal administrative review by the subject individual or the subject individual's representative may result in termination of hearing rights. The Department will review a request to reinstate hearing rights if received in writing by the Department within 14 days.
- (b) Criminal history check.
 - (A) If the denial was based on disclosed criminal history, the Department will conduct a criminal history check during the informal administrative review.
 - (B) The Department may conduct additional criminal history checks during the informal administrative review to update or verify the subject individual's criminal history.
- (c) Weighing Test Always Applied. The Department will use the weighing test as described in these rules during the administrative review.
- (d) Content of Administrative Review. The Department representative, the authorized designee, the subject individual and the subject individual's legal representative may discuss any of the matters listed in OAR 137-003-0575(3). The administrative review may also be used to:
 - (A) Inform the subject individual of the rules that serve as the basis for the denial.
 - (B) Ensure the subject individual understands the reason for the denial.

- (C) Give the subject individual an opportunity to review the information that is the basis for the denial, except as prohibited by state or federal law (See OAR 407-007-0340(2)).
 - (D) Give the Department and subject individual an opportunity to research or provide additional information to consider as listed in OAR 407-007-0300.
 - (E) Give the Department and the subject individual the opportunity to correct any misunderstanding of the facts.
 - (F) Provide an opportunity for the Department and the subject individual to resolve the situation, including developing an agreement whereby the subject individual may be approved with restrictions.
 - (G) Determine if the subject individual wishes to have any witness subpoenas issued should a formal hearing be necessary.
- (e) Decision Following Administrative Review. Upon completion of the informal review, the subject individual or the subject individual's legal representative is advised by the Department in writing of the finding within 14 days.
 - (f) Hearing Following Administrative Review. If the informal administrative review reverses the denial, no hearing will be held and the appeal will not be forwarded to the Office of Administrative Hearings. If the informal administrative review upholds the denial, the appeal will be referred to the Office of Administrative Hearings and a hearing is held unless the subject individual or the subject individual's legal representative withdraws the request for a contested case hearing or the Department reverses the denial before the hearing is held.
- (5) Contested Case Hearing.
- (a) Format. The hearing is conducted in accordance with Attorney General's Uniform and Model Rules of Procedure, "Hearing Panel Rules," OAR 137-003-0501 and the rules that follow.
 - (b) Department Representation. Employees of the Department may in accordance with ORS 183.452 be authorized by the Department's Director to represent the Department for the contested case hearing. Authorization from the Office of Attorney General is also required. The Department retains the right to be represented by the Attorney General.
 - (c) Exhibits. The administrative law judge must be provided a complete copy of the criminal history check information as follows:
 - (A) In the case of federal criminal history and criminal history from jurisdictions outside Oregon, the subject individual must obtain copies of

the FBI criminal history report, or a copy of the state criminal history report from each state in which there was criminal or arrest history recorded. The subject individual or the subject individual's legal representative must provide copies of such documentation to the administrative law judge at least seven days prior to the scheduled hearing. The Department may also provide out-of-state information received from other official sources.

- (B) In the case of Oregon criminal history, the Department may provide a copy of the LEDS print-out, OJIN records or other court records to the administrative law judge, unless to do so would result in ex parte communication.
 - (C) Criminal history information and correspondence regarding the subject individual's criminal history check are prima facie evidence if certified by the Department representative as a true copy.
- (d) Role of Administrative Law Judge. The Office of Administrative Hearings and the administrative law judge perform the following duties in the hearing process:
- (A) Provide the subject individual or the subject individual's legal representative with all of the information required under ORS 183.413(2) in writing before the hearing;
 - (B) Conduct the hearing;
 - (C) Issue a dismissal by order when neither the subject individual nor the subject individual's representative appears at the hearing; and
 - (D) Issue a proposed order.
- (e) Public Attendance. The informal conference and hearing are not open to the public.
- (f) Coordination with Licensure or Certification Hearing. A hearing pursuant to these rules may be conducted in conjunction with a licensure or certification hearing for the subject individual.
- (6) Withdrawal. The subject individual or the subject individual's legal representative may withdraw a hearing request orally or in writing at any time. The withdrawal is effective the date it is received by the Department or the Office of Administrative Hearings. A dismissal order will be issued by the Department or the Office of Administrative Hearings. The subject individual may cancel the withdrawal up to 14 days after the date the order is served.
- (7) Proposed and Final Order.

- (a) **Informal Disposition.** When an appeal is resolved before being referred to the Office of Administrative Hearings due to an administrative review or withdrawal, the Department will serve a final order confirming the resolution.
- (b) **Failure to Appear.** A hearing request is dismissed by order when neither the subject individual nor the subject individual's legal representative appears at the time and place specified for the hearing. The order is effective on the date scheduled for the hearing and is served by the Office of Administrative Hearings. The Department will cancel the dismissal order on request of the subject individual or the subject individual's legal representative on a showing that the subject individual and the subject individual's legal representative were unable to attend the hearing and unable to request a postponement for reasons beyond their control.
- (c) **Proposed Order.** After a hearing, the administrative law judge issues a proposed order. If no written exceptions are received by the Department within 14 days after the service of the proposed order, the proposed order becomes the final order.
- (d) **Exceptions.** If timely written exceptions to the proposed order are received by the Department, the Department Director or the Director's designee will consider the exceptions and serve a final order, or request a revised proposed order from the administrative law judge.
- (e) **Results to qualified entity.** The Department may provide the qualified entity with the results of the appeal after the informal administrative review or contested case hearing.

| Stat. Auth.: ORS 181.537, 409.010-~~&~~₂, 409.050
Stats. Implemented: ORS 181.537, 183.341