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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 407
DEPARTMENT OF HUMAN SERVICES

FILED

10/11/2021 3:40 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Permanent Updates for 2021 OR Law chapter 198, 2021 Measure 110 and ORCHARDS

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/03/2021 4:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 11/19/2021

TIME: 10:00 AM - 11:00 AM

OFFICER: Kelly Myrick

ADDRESS: MICROSOFT TEAMS MEETING

Call in (audio only) 1-971-277-2373

Conference ID 451 813 166

, OR 97301

SPECIAL INSTRUCTIONS:

HEARING NOTES: If you wish to provide comment, please call into the teleconference number no later than 15 minutes after the

TEAMS MEETING link: https://teams.microsoft.com/l/meetup-join/19%3ameeting_YTZiMjQwMzktZTE1ZC00Zjg4LWE5YzQtNjNhY2I5YWY1NDVj%40thread.v2/0?context=%7b%22Tid%22%3a%22a91a4313-fc1c-44f0-8c49-176393c61bc4%22%7d

NEED FOR THE RULE(S):

The Oregon Department of Human Services filed temporary rules 6/25/2021 to comply with new Oregon law impacting background checks for subject individuals of the Department. 2021 Measure 110 made several drug crimes violations which had previously been misdemeanors or felonies; as violations they are no longer considered potentially disqualifying in a background check under the Chapter 407 administrative rules. 2021 OR Law chapter 198 (2021 SB 280) corrected language in ORS 181A.195 and 443.004; these corrections allowed for more consistent consideration of Driving or Boating While Under the Influence convictions in a background check, and for improving subject individuals' ability to have new background checks in a consistent and timely manner. The temporary rules from 6/25/2021 also updated language in the background check process to match the many changes that have occurred since the implementation of the Background Check Unit's new Oregon Criminal History and Abuse Records Data System (ORCHARDS).

The Department now needs to make those temporary changes permanent. In addition, the Department has added more processing updates due to ORCHARDS. One important update involves the ability of the Department to now provide through ORCHARDS a check and review of certified nursing assistant abuse registries and licensing registries that is federally required for certain facilities licensed by the Department's Aging and People with Disabilities Safety Oversight and Regulatory Office.

Other changes in these rules correct grammatical errors, ensure consistent terminology, and improve the accuracy, structure and clarity of the rules.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2021orlaw0198.pdf for OR Law ch 198

<https://www.oregon.gov/oha/HSD/AMH/Pages/Measure110.aspx> for 2021 Measure 110

<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=1626> for current Background Check Unit rules

FISCAL AND ECONOMIC IMPACT:

The Department implemented these laws on 6/25/2021; there has been no visible fiscal impact. The addition of the CNA abuse registry check on certain background checks will add minimal time to background check since it involves only one type of subject individual and a finding on this registry leads to ineligibility.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

Department background checks cover hundreds of adult foster homes and child foster homes; as well as thousands of services providers across Oregon, from large corporations overseeing nursing facilities, to small business developmental disability service providers and self-employed home care workers. All of these entities have been subject to these rules for well over a decade; the current changes do not change who is subject to a background check. The change in potentially disqualifying convictions or conditions as well as small decrease denials may alleviate hiring stresses for the providers.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Representatives from several small business were invited to participate on the Rules Advisory Committee and to provide feedback on rules changes.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

407-007-0010, 407-007-0020, 407-007-0030, 407-007-0041, 407-007-0050, 407-007-0060, 407-007-0065, 407-007-0080, 407-007-0200, 407-007-0210, 407-007-0220, 407-007-0250, 407-007-0275, 407-007-0279, 407-007-0281, 407-007-0290, 407-007-0300, 407-007-0315, 407-007-0318, 407-007-0330, 407-007-0600, 407-007-0610, 407-007-0620, 407-007-0630

AMEND: 407-007-0010

RULE SUMMARY: This rules includes the definitions of words and terms used in chapter 407, division 007. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the new background check system,

ORCHARDS. The Department is proposing to make the temporary changes permanent.

CHANGES TO RULE:

407-007-0010

Definitions ¶¶

In addition to the definitions in OAR 125-007-0210, the following definitions apply to OAR 407-007-0000 to 407-007-0640 unless otherwise noted: ¶¶

- (1) "Abuse" has the meaning given in the administrative rules promulgated by the Department or Authority corresponding to the setting in which the abuse was alleged or investigated. ¶¶
- (2) "Abuse check" means obtaining and reviewing abuse allegations, abuse investigation reports, and associated exhibits and documents for the purpose of determining whether an SI has potentially disqualifying abuse. ¶¶
- (3) "Abuse investigation report" means a written report completed after an investigation into suspected abuse and retained by the Department or the Authority pursuant to ORS 124.085, 419B.030, or 430.757, or a similar report filed in another state agency or by another state. ¶¶
- (4) "Appeal process" means the process of contesting a final fitness determination of denied or approved with restrictions. ¶¶
- (5) "Approved" means that a subject individual, following a final fitness determination, is fit to work, volunteer, be employed, or otherwise perform in the position listed in the criminal records check request. ¶¶
- (6) "Approved with restrictions" or restricted approval means an approval in which some restriction is made to the position listed in the criminal records check request including but not limited to the SI, the SI's environment, the type or number of clients for whom the SI may provide care, or the information to which the SI has access. ¶¶
- (7) "Authority" means the Oregon Health Authority. ¶¶
- (8) "Authorized designee (AD)" means an individual whom the Department designates and authorizes to receive and process criminal records and abuse check requests from SIs; criminal records information, abuse investigation reports, and any other information gathered during the background check process; and to make fitness determinations. ¶¶
- (9) "Background check" means a criminal records check and an abuse check. ¶¶
- (10) "Background check submission date" means the date when the Background Check Unit receives a request for a criminal records check or abuse check as required by Oregon statute or administrative rule, including the subject individual's authorization for the checks. ¶¶
- (11) "Background Check Unit" means the Background Check Unit (BCU), a Shared Services unit which conducts criminal records checks, abuse checks and fitness determinations for the Department and the Authority. ¶¶
- (12) "Care" means the provision of care, treatment, education, training, instruction, supervision, placement services, recreation, or support to children, the elderly, or individuals with disabilities (see ORS 181A.200). ¶¶
- (13) "Client" means any individual who receives services, care, or funding for care through the Department or the Authority. ¶¶
- (14) "Criminal Justice Information" (CJI) means all of the Federal Bureau of Investigation (FBI) Criminal Justice Information Systems (CJIS) provided data necessary for law enforcement and civil agencies to perform their missions including but not limited to biometric, identity history, biographic, property, and case/incident history data. CJI also includes data stored in the Oregon Law Enforcement Data System (LEDS), the National Criminal Information Center (NCIC), and other criminal justice information systems files. See FBI CJIS Security Policy, version 5.8 (6/2019) or current version. ¶¶
- (15) "Criminal records check" means obtaining and reviewing criminal records and includes either or both of the following: ¶¶
 - (a) An Oregon criminal records check where criminal offender information is obtained from Oregon State Police (OSP) using LEDS. ¶¶
 - (b) A national criminal records check where criminal records are obtained from the FBI through the use of fingerprint cards sent to OSP and other identifying information. A national criminal records check also includes

criminal records obtained from the FBI exclusively through the use of identifying information if the FBI has determined that the SI's fingerprints are illegible. ¶

~~(16)~~ "~~Criminal Records Information Management System (CRIMS)~~" means the electronic and online records system used to process and maintain background checks in compliance with OAR 407-007-0000 to 407-007-0640. ¶

~~(17)~~ "Denied" means that a subject individual, following a fitness determination including a weighing test, is not fit to work, volunteer, be employed, or otherwise perform in the position listed in the criminal records check request. ¶

(187) "Department" means the Department of Human Services. ¶

(198) "Employee" in OAR 407-007-0000 to 407-007-0100, and 407-007-0400 to 407-007-0460, means an individual working in the Department or the Authority in any position including a new hire, promotion, demotion, direct appointment, re-employment, limited duration, job rotation, developmental assignment, transfer, an individual impacted by the Department's or the Authority's lay-off process, or temporary hire. ¶

~~(2019)~~ "Federal Tax Information" (FTI) tax return or return information received directly from the Internal Revenue Service (IRS) or obtained through an authorized secondary source, such as Social Security Administration (SSA), Federal Office of Child Support Enforcement (OCSE), Bureau of the Fiscal Service (BFS), or Centers for Medicare and Medicaid Services (CMS), or another entity acting on behalf of the IRS pursuant to an Internal Revenue Code (IRC) 6103(p)(2)(B) Agreement. ¶

(240) "Fingerprint capture" means taking the SI's fingerprints for a national criminal records check in a manner that meets current Oregon statutes and the OSP's capacity for receiving fingerprints. ¶

(221) "Fitness determination" means, regarding a criminal records check and abuse check when either or both are considered, the evaluation of whether an SI is fit to hold a position, provide care, or be granted a license, certifications, registrations or permit to provide care. Fitness determination includes: ¶

(a) The decision regarding SI disclosures, an Oregon criminal records check, and preliminary review (a preliminary fitness determination); or ¶

(b) The decision regarding SI disclosures, completed criminal and abuse records check when either or both are considered including the gathering of other information as necessary, and a final review by an AD (a final fitness determination). ¶

~~(232)~~ "Founded or substantiated" has the meaning given these terms in the Department or Authority's administrative rules corresponding to the setting in which the abuse was investigated. ¶

(243) "Good cause" means a valid and sufficient reason for not complying with time frames set during the criminal records check process, abuse check process, or appeal process, including but not limited to an explanation of circumstances beyond an SI's reasonable control. ¶

(254) "Hearing representative" means a Department employee representing the Department in a contested case hearing. ¶

(265) "Human Resources" in OAR 407-007-0000 to 407-007-0100, and 407-007-0400 to 407-007-0460, means either the Department's Office of Human Resources or the Authority's Office of Human Resources. ¶

(276) "Office of Training, Investigations, and Safety (OTIS)" means the Office of Training, Investigations, and Safety, formerly the Office of Adult Abuse Prevention and Investigations, a shared service of the Department and Authority which is responsible for coordinating and conducting abuse investigations and providing protective services regarding reports of abuse and neglect of vulnerable individuals. ¶

(27) "Oregon Criminal History and Abuse Records Data System (ORCHARDS)" means the electronic and online records system used to process and maintain background checks in compliance with OAR 407-007-0000 to 407-007-0640. ¶

(28) "Other criminal history information" means any information obtained and allowed for a fitness determination that is not criminal offender information from OSP. Other criminal history information includes but is not limited to police investigations and records, information from local or regional criminal records information systems, justice records, court records, information from the Oregon Judicial Case Information Network, sexual offender registration records, warrants, Oregon Department of Corrections records, Oregon Department of

Transportation's Driver and Motor Vehicle Services Division information, disclosures by an SI, and any other information from any jurisdiction obtained by or provided to the Department for the purpose of conducting a fitness determination during the current background check or from any previous background checks completed by the Department. ¶

(29) "Oregon Criminal History and Abuse Records Data System (ORCHARDS)" means the means the online records system used to process and maintain background checks OAR 407-007-0000 to 407-007-0640.¶

(29) "Position" means the job or placement listed on the criminal records check request or background check request for the SI to initiate an abuse check, criminal records check, or background check. Covered positions include any type of employment, volunteer placement, contract placement, or a living or visiting situation at a facility where such a background check is required. ¶

(30) "Subject individual (SI)" in OAR 407-007-0000 to 407-007-0100, and 407-007-0400 to 407-007-0460, means an individual on whom the Department may conduct a criminal records check and from whom the Department may require fingerprints for the purpose of conducting a national criminal records check. An SI includes any of the following: ¶

(a) A Department employee. ¶

(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 section (30)(e) of this rule. ¶

(d) A Department client who is placed in the Work Experience or JOBS Plus program at a Department site. ¶

(e) An individual who provides or seeks to provide services to the Department at Department facilities, sites, or offices as a contractor, subcontractor, vendor, volunteer under Department direction and control, or student under Department direction and control who: ¶

(A) May have contact with clients; ¶

(B) Has access to personal information about employees of the Department, clients, or members of the public, including but not limited to Social Security numbers, dates of birth, driver license numbers, medical information, personal financial information, or criminal background information; ¶

(C) Has 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) Has access to property held in trust or to private property in the temporary custody of the state; ¶

(E) Has payroll or fiscal functions or responsibility for: ¶

(i) Receiving, receipting or depositing money or negotiable instruments; ¶

(ii) Billing, collections, setting up financial accounts, or other financial transactions; or ¶

(iii) Purchasing or selling property; ¶

(F) Provides security, design or construction services for government buildings, grounds, or facilities; ¶

(G) Has access to critical infrastructure or secure facilities information; or ¶

(H) Is providing information technology services and has control over or access to information technology systems. ¶

(f) Any individual applying for employment or a volunteer placement or any employee, volunteer, contractor, or employee of any contractor in any of the following: ¶

(A) A State-operated or Authority-contracted secure residential treatment facility; ¶

(B) A State-operated group home within the Department's Stabilization and Crisis Unit; ¶

(C) Oregon State Hospital (OSH). ¶

(31) "Weighing test" means a process carried out by the Department in which available information is considered to make a fitness determination.

Statutory/Other Authority: ORS 181A.195, 181A.200, 409.050

Statutes/Other Implemented: ORS 181A.195, 181A.200, 409.010

AMEND: 407-007-0020

RULE SUMMARY: This rule outlines when a new criminal records check is required for subject individuals subject to OAR 407-007-0000 to 407-007-0100. The proposed updates match current practice in background check requirements.

CHANGES TO RULE:

407-007-0020

Criminal History Check Required ¶¶

(1) SIs must have a criminal records check in the following circumstances: ¶¶

(a) If an individual becomes an SI on or after the effective date of these rules. ¶¶

(b) Except as provided in section (2) of this rule, if the individual, whether previously considered an SI or not, changes positions, and the position requires a criminal records check. ¶¶

(A) Change in a position may include but is not limited to promotion, transfer, demotion, re-employment, job rotation, developmental assignment, restoration, layoff, or recall. ¶¶

any return after break in service, temporary hire, agency temporary hire, temporary hire to permanent hire, lateral transfer from one district or unit to another district or unit, job rotation, rotation to permanent, developmental assignment, work out of class, work out of class to permanent, direct appointment, restoration, layoff, or recall. Change in a position also includes a substantial change in job duties indicating more responsibility or access in the duties as described in OAR 407-007-0060(3), as written in the SI's position description. ¶¶

(B) Change in a position would not include a lateral transfer in which the SI maintains the same position title, same classification within the same unit or district, and with the same job duties as written in the SI's position description. ¶¶

(c) If the Department has reason to believe that a criminal records check is justified. Examples include but are not limited to credible evidence of new potentially disqualifying convictions or conditions by an SI or quality assurance monitoring of a previously conducted criminal records check. ¶¶

(d) If the SI's position requires use or access to CJI, or CJIS clearance pursuant to the FBI CJIS Security Policy, version 5.8 (6/2019) or current version. ¶¶

(e) If the SI's position in state services requires use or access to FTI, the SI must have a new criminal records check every five years. ¶¶

(2) Human Resources may determine that conducting a new criminal records check and fitness determination for an employee is not required. ¶¶

(a) After submission of a criminal records check, Human Resources may consider ending the criminal records check if: ¶¶

(A) The SI who has been offered a new position has completed a previous criminal records check and fitness determination with an outcome of approved; and ¶¶

(B) There has been no break in employment with the Department. ¶¶

(b) Human Resources may cease the criminal records check without making a new fitness determination if there is no indication of new potentially disqualifying crimes or conditions, and at least one of the following is true: ¶¶

(A) The previous criminal records check identified no potentially disqualifying crimes or conditions as defined at that time and Human Resources determines that the previous fitness determination is sufficient for the new position. ¶¶

(B) Human Resources determines that the new position requires the same or less responsibility or access in the duties as described in OAR 407-007-0060(3). ¶¶

(3) All SIs shall notify Human Resources within five days of being arrested, charged, or convicted of any crime.

Statutory/Other Authority: ORS 181A.195, 181A.200, 409.050

Statutes/Other Implemented: ORS 181A.195, 181A.200, 409.010

AMEND: 407-007-0030

RULE SUMMARY: This rule explains the process of a criminal records check for subject individuals subject to OAR 407-007-0000 to 407-007-0100. Updates to this rule, made in a temporary filing effective 6/25/2021, included changes and corrections to match the new background check process system, ORCHARDS, and to match current practice. The Department proposes to make these changes permanent.

CHANGES TO RULE:

407-007-0030

Criminal Records Check Process ¶

(1) In order to conduct a background check on an SI, BCU must receive authorization from the SI allowing the criminal records check and abuse check to proceed. If the SI refuses to provide authorization for the background check, BCU terminates the background check immediately and the Department may not allow the SI to work, volunteer, be employed, or otherwise perform in positions covered by these rules.¶

(2) The Department shall conduct a criminal records check on an SI through LEDS maintained by the Oregon State Police (OSP) in accordance with ORS chapter 181A and the rules adopted pursuant thereto (see OAR Chapter 125, division 007 and Chapter 257, division 15). ¶

(23) The criminal records check may include one or more types of criminal records checks as defined in OAR 407-007-0010. The date of the last criminal records check completed before the final fitness determination shall be considered the date of the background check's criminal records check.¶

(4) If a national criminal records check of an SI is necessary, OSP shall provide the Department the results of criminal records checks conducted pursuant to ORS 181A.195, including fingerprint identification, through the FBI. ¶

(35) Only Department employees who are ADs may be authorized and approved to receive and evaluate criminal offender information and other criminal records information, and to conduct fitness determinations. ¶

(46) The Department shall submit the criminal records check to BCU through CRIMS. In addition to information required in ORCHARDS. In accordance with OAR 125-007-0220, the criminal records check request shall include the following:¶

(a) Disclosure of potentially disqualifying criminal history: ¶

(A) The SI must disclose information regarding the SI: ¶

(a) Legal name and aliases; ¶

(b) Date of birth; ¶

(c) Address and recent residency information; ¶

(d) Driver license or identification card information; ¶

(e) Disclosure of potentially disqualifying criminal history: ¶

(A) While the SI may provide minimal information to meet this requirement, the Department finds that more details from the SI provides positive information for the weighing test in OAR 407-007-0060. The SI may disclose details of potentially disqualifying convictions and potentially disqualifying criminal conditions at a minimum, and may disclose all arrests, charges, and convictions regardless of outcome or date of occurrence. Disclosure includes any juvenile or adult record of custody, arrests, or charges; and the outcome of custody, arrests, or charges against a juvenile or adult. ¶

(B) The disclosed crimes and the dates must reasonably match the SI's criminal offender information and other criminal history information, as determined by the Department. ¶

(C) The SI is not required to disclose any criminal history which has been expunged or set aside by a court in any jurisdiction. However, if the SI does disclose expunged or set aside criminal history, the Department may not consider the criminal history as potentially disqualifying or in a weighing test if the Department has proof that the criminal history has been expunged or set aside by a court in any jurisdiction. ¶

(D) The Department may only consider criminal history as allowed in the weighing test, OAR 407-007-03060. ¶

(b) Disclosure of other history required under OAR 407-007-0400 to 407-007-0460. ¶

- (eg) Disclosure of other information to be considered in the event of a weighing test if the SI discloses any criminal history or other history required under OAR 407-007-0400 to 407-007-0460: ¶
- (A) The SI may provide mitigating information for BCU to review in a weighing test. ¶
- (B) Human Resources or BCU may require the SI to provide other information as needed to conduct the weighing test. ¶
- (dh) Position title and description of duties to be considered. ¶
- (57) The criminal records check request shall include the following: ¶
- (a) A notice regarding disclosure of Social Security number indicating: ¶
- (A) The SI's disclosure of his or her Social Security Number is voluntary; and ¶
- (B) The Department requests the Social Security number solely for the purpose of positively identifying the SI during the criminal records check process. ¶
- (b) A notice that the SI may be subject to fingerprinting and a criminal records check. ¶
- (c) A notice that the SI has the right to challenge criminal history through the local source of the information. ¶
- (68) The Department shall verify the SI's identity using methods which include but are not limited to asking for current and valid government-issued photo identification and confirming the information on the photo identification with the SI and the information included in the criminal records check request. ¶
- (79) BCU shall conduct an Oregon criminal records check after receiving a criminal records check request. Using information submitted, BCU may obtain criminal offender information from the LEDS system and may request other criminal history information as needed. ¶
- (810) BCU may conduct a fingerprint-based national criminal records check after an Oregon criminal records check is completed. ¶
- (a) A fingerprint-based national criminal records check may be completed under any of the following circumstances: ¶
- (A) The SI has out of state residency evidenced by the SI's possession of an out of state driver license or being outside Oregon for 60 or more consecutive days during the previous five years. ¶
- (B) The criminal offender information from the LEDS check, SI disclosures, or any other criminal history information obtained by the Department indicates there may be criminal records outside of Oregon. ¶
- (C) The Department has reason to question the identity or history of the SI. ¶
- (D) The SI's position is at Oregon state institutions under OAR 407-007-0010. ¶
- (E) The SI is assigned duties involving any aspect of a criminal records or abuse check process. ¶
- (F) A fingerprint-based criminal records check is required by federal or state laws or regulations, other rules adopted by the Department, or by contract with the Department. ¶
- (G) If the Department has reason to believe that fingerprints are needed to make a final fitness determination. ¶
- (b) BCU shall request fingerprints for an SI under the age of 18 in accordance with OAR 125-007-0220(3). ¶
- (c) The SI shall complete and submit a fingerprint capture when requested by the Department. ¶
- (A) The Department shall give the SI notice regarding the Social Security number as set forth in section (5) of this rule. ¶
- (B) The Department may require new fingerprint capture if previous captures are rejected by OSP or the FBI. ¶
- (911) BCU requires that due diligence be exercised in complying with national criminal records check requirements including fingerprints. However, if BCU determines that an SI is unable to submit fingerprints, BCU shall document the circumstances that lead to the decision to waive fingerprinting and proceed with obtaining other criminal history information from states based on an SI's residential history and disclosures in lieu of a fingerprint based criminal records check as required in this rule. A fingerprint-based national criminal records may be waived due to inability to submit fingerprints unless fingerprints are required by state or federal laws or regulations. Reasons for inability to submit fingerprints include but are not limited to: ¶
- (a) A physical condition in which all the SI's fingerprints are illegible or missing, or which makes the capture of fingerprints impossible; ¶
- (b) A mental or psychological condition which makes the capture of fingerprints impossible; ¶
- (c) Undue safety risk to the SI or other individuals in capturing the fingerprints. ¶

(102) The Department may also research other criminal history information from other states in lieu of or in addition to a national criminal records check. Reasons for such research include but are not limited to when: ¶

(a) The Department has reason to believe that out-of-state criminal records may exist. ¶

(b) The Department has been unable to complete a national criminal records check due to illegible fingerprints. ¶

(c) The national criminal records check results show incomplete information about charges or criminal records without final disposition. ¶

(d) There is indication of residency or criminal records in a state that does not submit all criminal records to the FBI. ¶

(e) Based on available information, the Department has reason to believe that other criminal history information regarding the SI is present in another state. ¶

(143) In order to complete a criminal records check and fitness determination, the Department may require additional information from an SI. ¶

(a) Additional information includes but is not limited to criminal, judicial, other background information, or proof of identity. ¶

(b) If an SI 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. ¶

(124) BCU may conduct further research regarding criminal history through local jurisdiction courts, Department records, or other resources. ¶

(135) In addition to criminal records check requirements in this rule, a criminal records check for an SI in a position which requires use or access to CJI, or CJIS clearance must include: ¶

(a) A fingerprint-based national check; ¶

(b) A review by Oregon State Police for CJIS clearance; ¶

(146) In addition to criminal records check requirements in this rule, a criminal records check for an SI in a position which requires use or access to FTI must include: ¶

(a) A fingerprint-based national check; ¶

(b) A check of local law enforcement agencies where the SI has lived, worked, or attended school within the past five years; ¶

(c) Validation of the SI's eligibility to legally work in the United States. ¶

(157) The Department may conduct a criminal records check in situations of imminent danger on SIs who have been background checked under these rules. ¶

(a) If the Department determines there is indication of potentially disqualifying criminal behavior by an SI that could more likely than not pose an immediate risk to the Department, its clients, or vulnerable persons, the Department shall authorize a criminal records check without the completion of a criminal records check request. ¶

(b) If the Department determines that a fitness determination based on the criminal records check would be adverse to the SI, the Department shall provide the SI, if available, the opportunity to disclose potentially disqualifying convictions and conditions, and other information as indicated in OAR 407-007-0060 before the completion of the fitness determination. ¶

(168) Criminal records checks conducted under this rule shall be documented in writing.

Statutory/Other Authority: ORS 181A.195, 181A.200, 409.050

Statutes/Other Implemented: ORS 181A.195, 181A.200, 409.010

AMEND: 407-007-0041

RULE SUMMARY: This rule lists the convictions that are potentially disqualifying in OAR 407-007-0000 to 407-007-0100 and for how long. Updates to this rule, made in a temporary filing effective 6/25/2021, included changes due to 2021 Or Law 198 (2021 SB 280) and 2021 OR Measure 110. The Department proposes to make these changes permanent, as well as corrections to permanent review crimes to match current Oregon statutes.

CHANGES TO RULE:

407-007-0041

Potentially Disqualifying Convictions

- (1) A conviction of any of the crimes listed in these rules is potentially disqualifying. Offenses or convictions that are classified as less than a misdemeanor, such as violations or infractions, are not potentially disqualifying (see ORS 161.505 to 161.565).¶¶
- (2) The crimes listed in this section are permanent review crimes which require that a fitness determination with a weighing test be completed regardless of date of conviction.¶¶
- (a) ORS 163.095, Aggravated murder¶¶
- (b) ~~ORS 163.107, Murder I~~¶¶
- (c) ~~ORS 163.115, Murder II~~¶¶
- (ed) ORS 163.118, Manslaughter I¶¶
- (de) ORS 163.125, Manslaughter II¶¶
- (ef) ORS 163.145, Criminally negligent homicide¶¶
- (fg) ORS 163.149, Aggravated vehicular homicide¶¶
- (gh) ORS 163.165, Assault III¶¶
- (hi) ORS 163.175, Assault II¶¶
- (ij) ORS 163.185, Assault I¶¶
- (jk) ORS 163.187, Strangulation¶¶
- (kl) ORS 163.200, Criminal mistreatment II¶¶
- (lm) ORS 163.205, Criminal mistreatment I¶¶
- (mn) ORS 163.225, Kidnapping II¶¶
- (no) ORS 163.235, Kidnapping I¶¶
- (op) ORS 163.263, Subjecting another person to involuntary servitude in the second degree¶¶
- (pq) ORS 163.264, Subjecting another person to involuntary servitude in the first degree¶¶
- (qr) ORS 163.266, Trafficking in persons¶¶
- (rs) ORS 163.275, Coercion¶¶
- (st) ORS 163.355, Rape III¶¶
- (tu) ORS 163.365, Rape II¶¶
- (uv) ORS 163.375, Rape I¶¶
- (vw) ORS 163.385, Sodomy III¶¶
- (wx) ORS 163.395, Sodomy II¶¶
- (xy) ORS 163.405, Sodomy I¶¶
- (yz) ORS 163.408, Unlawful sexual penetration II¶¶
- (zaa) ORS 163.411, Unlawful sexual penetration I¶¶
- (aab) ORS 163.413, Purchasing sex with a minor, if the courts designate the offense as a sex crime pursuant to ORS 163.413(3)(d), or the offense is the defendant's second or subsequent convictions under ORS 163.413(3)(b)(B)¶¶
- (bbc) ORS 163.415, Sexual abuse III¶¶
- (ced) ORS 163.425, Sexual abuse II¶¶
- (dee) ORS 163.427, Sexual abuse I¶¶
- (eff) ORS 163.432, Online sexual corruption of a child in the second degree, if the offender reasonably believed the child to be more than five years younger than the offender¶¶

(~~ff~~gg) ORS 163.433, Online sexual corruption of a child in the first degree, if the offender reasonably believed the child to be more than five years younger than the offender¶

(~~gg~~hh) ORS 163.435, Contributing to the sexual delinquency of a minor¶

(~~hh~~ii) ORS 163.445, Sexual misconduct, if the offender is at least 18 years of age¶

(~~ii~~jj) ORS 163.465, Public indecency¶

(~~jj~~kk) ORS 163.467, Private indecency¶

(~~kk~~ll) ORS 163.525, Incest, with a child victim¶

(~~ll~~mm) ORS 163.535, Abandonment of a child¶

(~~mm~~nn) ORS 163.537, Buying or selling a person under 18 years of age¶

(~~nn~~oo) ORS 163.547, Child neglect I¶

(~~oo~~pp) ORS 163.670, Using child in display of sexually explicit conduct¶

(~~pp~~qq) ORS 163.680, Paying for viewing a child's sexually explicit conduct¶

(~~qq~~rr) ORS 163.684, Encouraging child sexual abuse I¶

(~~rr~~ss) ORS 163.686, Encouraging child sexual abuse II¶

(~~ss~~tt) ORS 163.687, Encouraging child sexual abuse III¶

(~~tt~~uu) ORS 163.688, Possession of materials depicting sexually explicit conduct of a child I¶

(~~uu~~vv) ORS 163.689, Possession of materials depicting sexually explicit conduct of a child II¶

(~~vv~~ww) ORS 163.700, Invasion of personal privacy II¶

(~~ww~~xx) ORS 163.701, Invasion of personal privacy I¶

(~~xx~~yy) ORS 163A.005, All crimes listed in definition of "Sex Crime", including ~~€~~Transporting child pornography into the state ¶

(~~yy~~zz) ORS 164.055, Theft I¶

(~~zz~~aaa) ORS 164.057, Aggravated theft I¶

(~~aaa~~bbb) ORS 164.098, Organized retail theft¶

(~~bbb~~ccc) ORS 164.125, Theft of services¶

(~~ccc~~ddd) ORS 164.215, Burglary II¶

(~~ddd~~eee) ORS 164.225, Burglary I¶

(~~eee~~fff) ORS 164.325, Arson I¶

(~~fff~~ggg) ORS 164.377, Computer crime¶

(~~ggg~~hhh) ORS 164.405, Robbery II¶

(~~hhh~~iii) ORS 164.415, Robbery I¶

(~~iii~~jjj) ORS 165.013, Forgery I¶

(~~jjj~~kkk) ORS 165.022, Criminal possession of a forged instrument I¶

(~~kkk~~lll) ORS 165.032, Criminal possession of a forgery device¶

(~~lll~~mmm) ORS 165.800, Identity theft¶

(~~mmm~~nnn) ORS 165.803, Aggravated identity theft¶

(~~nnn~~ooo) ORS 167.012, Promoting prostitution¶

(~~ooo~~ppp) ORS 167.017, Compelling prostitution¶

(~~ppp~~qqq) ORS 167.057, Luring a minor¶

(~~qqq~~rrr) ORS 167.320, Animal abuse I¶

(~~rrr~~sss) ORS 167.322, Aggravated animal abuse I¶

(~~sss~~ttt) ORS 167.333, Sexual assault of animal¶

(~~ttt~~uuu) ORS 475.752(1), (2), and (2d), Prohibited acts generally (regarding delivery and manufacture drug crimes; formerly ORS 475.840, 2005-2011)¶

(~~uuu~~vvv) ORS 475.806, Unlawful manufacture of hydrocodone¶

(~~vvv~~www) ORS 475.808, Unlawful manufacture of hydrocodone within 1,000 feet of school¶

(~~www~~xxx) ORS 475.810, Unlawful delivery of hydrocodone¶

(~~xxx~~yyy) ORS 475.812, Unlawful delivery of hydrocodone within 1,000 feet of school¶

(~~yyy~~zzz) ORS 475.816, Unlawful manufacture of methadone¶

(zzzaaaa) ORS 475.818, Unlawful manufacture of methadone within 1,000 feet of school¶

(aaaaabbbb) ORS 475.820, Unlawful delivery of methadone¶

(bbbcccc) ORS 475.822, Unlawful delivery of methadone within 1,000 feet of school¶

(eeedddd) ORS 475.826, Unlawful manufacture of oxycodone¶

(deeee) ORS 475.828, Unlawful manufacture of oxycodone within 1,000 feet of school¶

(eeeffff) ORS 475.830, Unlawful delivery of oxycodone¶

(fffgggg) ORS 475.832, Unlawful delivery of oxycodone within 1,000 feet of school¶

(gggghhhh) ORS 475.840(1) and (2), Prohibited acts generally (regarding delivery and manufacture drug crimes formerly ORS 475.992; renumbered to ORS 475.752 in 2011)¶

(hhhhijii) ORS 475.846, Unlawful manufacture of heroin¶

(iiijjjj) ORS 475.848, Unlawful manufacture of heroin within 1,000 feet of school¶

(jjkkkk) ORS 475.850, Unlawful delivery of heroin¶

(kkkkLLLL) ORS 475.852, Unlawful delivery of heroin within 1,000 feet of school¶

(LLLmmmm) ORS 475.866, Unlawful manufacture of 3,4-methylenedioxymethamphetamine¶

(mmmmnnnn) ORS 475.868, Unlawful manufacture of 3,4-methylenedioxymethamphetamine within 1,000 feet of school¶

(nnnnoooo) ORS 475.870, Unlawful delivery of 3,4-methylenedioxymethamphetamine¶

(oooopppp) ORS 475.872, Unlawful delivery of 3,4-methylenedioxymethamphetamine within 1,000 feet of school¶

(ppppqqqq) ORS 475.876, Unlawful manufacture of cocaine¶

(qqqqrrrr) ORS 475.878, Unlawful manufacture of cocaine within 1,000 feet of school¶

(rrrrssss) ORS 475.880, Unlawful delivery of cocaine¶

(sssstttt) ORS 475.882, Unlawful delivery of cocaine within 1,000 feet of school¶

(ttttuuuu) ORS 475.886, Unlawful manufacture of methamphetamine¶

(uuuuvvvv) ORS 475.888, Unlawful manufacture of methamphetamine within 1,000 feet of school¶

(vvvvwwww) ORS 475.890, Unlawful delivery of methamphetamine¶

(wwwwxxxx) ORS 475.892, Unlawful delivery of methamphetamine within 1,000 feet of school¶

(xxxxyyyy) ORS 475.904, Unlawful delivery of controlled substance within 1,000 feet of school¶

(yyyyzzzz) ORS 475.906, Penalties for distribution to minors¶

(zzzaaaaa) ORS 475.908, Causing another person to ingest a controlled substance¶

(aaaaabbbb) ORS 475.910, Application of controlled substance to the body of another person¶

(bbbcccc) ORS 475.914, Prohibited acts for registrants (with the Oregon State Board of Pharmacy)¶

(eeedddd) Any crime of attempt, solicitation, or conspiracy to commit a crime listed in this section pursuant to ORS 161.405, 161.435, or 161.450¶

(deeee) Any crime in any other jurisdiction that is the substantial equivalent of any of the Oregon crimes listed in this section, as determined by BCU, including any U.S. military crime¶

(2) The crimes listed in this section are ten-year review crimes which require that a fitness determination with a weighing test be completed if the date of conviction is within ten years of the background check submission.¶

(a) Any misdemeanor or felony not listed in section (1) or (3) of this rule in Oregon or any other jurisdiction. This includes U.S. military crimes not considered to be the substantial equivalent of crimes listed in section (1) of this rule.¶

(b) Any crime of attempt, solicitation, or conspiracy to commit a crime listed in this section pursuant to ORS 161.405 or 161.435¶

(3) Two or more convictions of ORS 813.010; (Driving under the Influence of Intoxicants (DUI)) or ORS 830.325 (Operating Boat while under Influence of Intoxicants) or a misdemeanor conviction under a law in any jurisdiction that imposes criminal penalties for operating a vehicle or boat while under the influences of intoxicants, are potentially disqualifying if they have occurred within five years of the date of the background check submission.¶

(a) A single conviction of ORS 813.010 criminal records check. ¶

(a) A single conviction of a crime in section (3) of this rule is not considered potentially disqualifying regardless of

the date of conviction. ¶

(b) If an SI has two or more convictions of ~~ORS 813.010~~ a crime in section (3) of this rule and only one, or none, occurred within five years from the date of the background check submission, the convictions are not potentially disqualifying. ¶

(4) Evaluations of crimes may be based on available information in Oregon laws and laws in other jurisdictions regarding the crime. ¶

(5) Under no circumstances may a crime be considered potentially disqualifying if it is: ¶

(a) Related to marijuana ~~and~~ if the crime is no longer a criminal offense in the originating jurisdiction. ¶

(b) Part of a juvenile record that has been expunged pursuant to ORS 419A.260 to 419A.262. ¶

(c) Part of an adult record that has been set aside pursuant to ORS 137.225.

Statutory/Other Authority: ORS 181A.195, ORS 409.050

Statutes/Other Implemented: ORS 181A.195, 2021 OR Law Ch. 198, 2021 OR Measure 110

AMEND: 407-007-0050

RULE SUMMARY: This rule explains the conditions which are potentially disqualifying for OAR 407-007-0000 to 407-007-0100. Updates to this rule, made in a temporary filing effective 6/25/2021, included changes to match current Oregon statutes. The Department proposes to make these changes permanent.

CHANGES TO RULE:

407-007-0050

Potentially Disqualifying Conditions ¶¶

Pursuant to OAR 125-007-0270(5), the following are potentially disqualifying conditions, if they exist on the date of the final fitness determination unless otherwise noted: ¶¶

(1) False statement is potentially disqualifying when all the following conditions are met: ¶¶

(a) In a background check request, an SI has submitted the answer, "No" to the question regarding whether the SI has criminal history; ¶¶

(b) The Department finds potentially disqualifying criminal history in the criminal records check; and ¶¶

(c) The found potentially disqualifying criminal history occurred before the date of the SI's submission. ¶¶

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

(3) The SI has an outstanding warrant for any permanent review crime in any jurisdiction. ¶¶

(4) The SI has a deferred sentence, conditional discharge, or is participating in a diversion program for a permanent review crime in any jurisdiction. ¶¶

(5) The SI is currently on probation, parole, or post-prison supervision for a potentially disqualifying crime in any jurisdiction. ¶¶

(6) The SI is found in violation of post-prison supervision, parole, or probation for a potentially disqualifying crime or condition in any jurisdiction regardless of the original conviction date within five years ~~or less~~ from the ~~background check submission date~~ date of the final fitness determination. ¶¶

(7) The SI has an unresolved arrest, charge, or a pending indictment for any permanent review crime. ¶¶

(8) The SI has been arrested for a permanent review crime in any jurisdiction as a fugitive from another state or a fugitive from justice for a permanent review crime that results in a potentially disqualifying conviction or condition. ¶¶

(9) An adjudication in a juvenile court in any jurisdiction, finding that the SI was responsible for a permanent review crime that would result in a conviction if committed by an adult. Subsequent adverse rulings from a juvenile court, such as probation violations, shall also be considered potentially disqualifying if within five years from the date of the final fitness determination. ¶¶

(10) A finding of "guilty except for insanity," "guilty except by reason of insanity," "not guilty by reason of insanity," "responsible except for insanity," "not responsible by reason of mental disease or defect," or similarly worded disposition in any jurisdiction regarding a permanent review crime, unless the local statutes indicate that such an outcome is considered an acquittal.

Statutory/Other Authority: ORS 181A.195, 181A.200, 409.050

Statutes/Other Implemented: ORS 181A.195, 181A.200, 409.010

AMEND: 407-007-0060

RULE SUMMARY: This rule explains factors considered in a weighing test if subject individuals subject to OAR 407-007-0000 to 407-007-0100 and potentially disqualifying conviction or conditions (OAR 407-007-0041, 407-007-0050). Updates to this rule, made in a temporary filing effective 6/25/2021, included changes and corrections to new laws (2021 Or Law ch 198 [2021 SB 280] and 2021 Measure 110). The Department proposes to make these changes permanent.

CHANGES TO RULE:

407-007-0060

Weighing Test ¶¶

If the SI has potentially disqualifying convictions under OAR 407-007-0041, or potentially disqualifying conditions under OAR 407-007-0050, the Department shall conduct a weighing test. The weighing test shall include consideration of factors pursuant to ORS 181A.195 and the following if available at the time of the weighing test: ¶¶

(1) Circumstances regarding the nature of potentially disqualifying crimes and conditions including but not limited to: ¶¶

(a) Age, maturity and capacity of the SI at time of the potentially disqualifying conviction or condition. ¶¶

(b) Details of incidents leading to or resulting in potentially disqualifying convictions or conditions. ¶¶

(c) Facts that support the potentially disqualifying conviction or condition. ¶¶

(d) Passage of time since commission of the crime or potentially disqualifying condition. ¶¶

(e) Consideration of state or federal laws, regulations, or rules covering the position or the Department, regarding the potentially disqualifying convictions or conditions. ¶¶

~~(2f) Other factors when available including but not limited to:~~ Consideration of state or federal laws, regulations, or rules that limited to: ¶¶

~~(a) Periods of incarceration, including rehabilitation or other impacts on SI.~~ ¶¶

~~(b) Status of and compliance with parole, post-prison supervision, or probation regarding~~ what is considered potentially disqualifying. For example: ¶¶

~~(A) Effective February 1, 2021, most possession crimes in Oregon were reduced to violations, making them no longer potentially disqualifying.~~ ¶¶

~~(B) The Department may give less weight to a potentially disqualifying convictions or conditions.~~ ¶¶

~~(c) Evidence of drug or alcohol issues directly related to which is only potentially disqualifying because it was a crime at the time it occurred but at the time of the weighing test is no longer considered a crime nor is associated with any potentially disqualifying convictions or conditions.~~ ¶¶

~~(d) Evidence of other treatment or rehabilitation related to~~ The consideration given potentially disqualifying convictions or conditions. ¶¶

~~(e) Likelihood of repeti impacted by federal laws, regulation of behaviors leading to,~~ or rules is determined by the number of these potentially disqualifying convictions or conditions. ¶¶

~~(f) If a ten-year review conviction or a condition is related to driving any vehicle or conveyance while under the influence of intoxicants in any jurisd and evaluation of relevant factors in sections (1), (2) and (3).~~ ¶¶

~~(2) Other factors when available including but not limited to:~~ ¶¶

~~(a) Periods of incarceration, including rehabilitation or other impacts on SI.~~ ¶¶

~~(b) Status of and compliance with parole, post-prison supervision, or probation regarding~~ potentially disqualifying conviction, consideration shall be given that, for an SI subject to OAR 407-007-0040(3),s or conditions. ¶¶

~~(c) Evidence of drug or alcohol issues directly related two or more convictions of ORS 813.010 are needed within five years~~ potentially disqualifying convictions or conditions. ¶¶

~~(d) Evidence of othe background check to be considered potentially disqualifying. If the ten-year reviewr treatment or rehabilitation related to potentially disqualifying convictions or the condition have similar circumstances to ORS 813.010, then less weight may be given to thes.~~ ¶¶

- (e) Likelihood of repetition of behaviors leading to potentially disqualifying convictions or conditions. ¶
- (gf) Changes in circumstances subsequent to the criminal activity or disqualifying conditions including but not limited to: ¶
 - (A) History of high school, college, or other education related accomplishments. ¶
 - (B) Work history (employee or volunteer). ¶
 - (C) History regarding licensure, certification, or training for licensure or certification. ¶
 - (D) Written recommendations from current or past employers. ¶
- (hg) Indication of the SI's cooperation, honesty during the background check process, including: ¶
 - (A) Acknowledgment and acceptance of responsibility of potentially disqualifying convictions and conditions; or ¶
 - (B) Providing false, incomplete or misleading information regarding potentially disqualifying convictions and conditions, or any subsequent circumstances. ¶
- (3) The Department shall consider the relevancy of the SI's potentially disqualifying convictions or conditions to the position or to the environment of the position. Consideration includes the relation between the SI's potentially disqualifying convictions 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 records information. ¶
 - (k) Access to medications, chemicals, or hazardous materials; 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 includes 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. ¶
 - (o) Access or use of CJI, or the need for CJIS clearance. ¶
 - (p) Access or use of FTI.

Statutory/Other Authority: ORS 181A.195, 181A.200, 409.050

Statutes/Other Implemented: ORS 181A.195, 181A.200, 409.010, 443.008

AMEND: 407-007-0065

RULE SUMMARY: This rule explains when and how hiring on a preliminary basis is allowed for subject individuals subject to OAR 407-007-0000 to 407-007-0100. Updates to this rule, made in a temporary filing effective 6/25/2021, included corrections to match current practice. The Department proposes to make these changes permanent and also to make changes to match processing changes due to the new background check processing system, ORCHARDS.

CHANGES TO RULE:

407-007-0065

Hired on a Preliminary Basis ¶¶

The Department shall make a preliminary fitness determination to determine if an SI may work, volunteer, be employed, or otherwise perform in the position listed in the criminal records check request prior to a final fitness determination. The Department may not hire an SI on a preliminary basis prior to the completion of a preliminary fitness determination. ¶¶

(1) The Department shall complete a preliminary fitness determination and send notice to ~~the hiring manager~~ Human Resources. ¶¶

(2) After review of the criminal records check request, the Department shall make one of the following determinations: ¶¶

(a) An SI may be hired on a preliminary basis, only during the time period ~~prior to a final fitness determination,~~ between the submission of the background check with all the required information from OAR 407-007-0030(1) and 407-007-0030(6) on the SI and a final fitness determination for the SI. Hiring on a preliminary basis is only allowed into the position listed in the criminal records check request ~~and allowed to~~ for the purpose of participating in training, orientation, and position ~~activities~~ under the one of the following circumstances: ¶¶

(A) If there is no indication of potentially disqualifying convictions or conditions in the criminal records check request and the Department has no reason to believe the SI has potentially disqualifying convictions or conditions. ¶¶

(B) If an SI discloses potentially disqualifying convictions or conditions, the SI may be hired on a preliminary basis only after BCU completes a weighing test. The Department may hire an SI on a preliminary basis only if, based on information available at the time, BCU determines that more likely than not that the SI poses no potential threat to the Department, its clients, or vulnerable persons. ¶¶

(b) The Department may not hire an SI on a preliminary basis if the BCU or Human Resources determines that: ¶¶

(A) After a weighing test, the SI more likely than not poses a potential threat to the Department, its clients, or vulnerable persons; ¶¶

(B) The SI's most recent criminal records check under these rules or other Department criminal records check rules resulted in a denial; or ¶¶

(C) The SI is currently involved in contesting a criminal records check determination under these or other Department criminal records check or abuse check rules. ¶¶

(3) An SI 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 records check rules. The individual providing active supervision shall do at all times the following: ¶¶

(a) Be in the same building as the SI or, if outdoors of Department buildings or any location off Department property, be within line of sight and hearing of the SI; ¶¶

(b) Know where the SI is and what the SI is doing; and ¶¶

(c) Periodically observe the actions of the SI. ¶¶

(4) An SI who was approved without restrictions within the previous 24 months through a documented criminal records check pursuant to these 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: ¶¶

(a) If the SI cannot provide documented proof that he or she worked continuously under the previous approval for

at least one year. ¶

(b) If there is evidence of criminal activity within the previous 24 months. ¶

(c) If the Department determines the job duties in the new position are so substantially different from the previous position that the previous fitness determination is inadequate for the new position. ¶

(5) The Department may immediately remove an SI hired on a preliminary basis from the position. Removal is not subject to hearing or appeal. Reasons for removal include but are not limited to the following: ¶

(a) There is any indication of falsification in the criminal records check request. ¶

(b) The Department determines that allowing the SI to be hired on a preliminary basis is not appropriate, based on the application, criminal records, position duties, preliminary fitness determination by the Department, or regulations regarding the position. ¶

(6) Nothing in this rule is intended to require that an SI, who is eligible for being hired on a preliminary basis be allowed to work, volunteer, be employed, or otherwise perform in the position listed in the criminal records check request prior to a final fitness determination. ¶

(7) Preliminary fitness determinations must be documented in writing, including any details regarding a weighing test, if required.

Statutory/Other Authority: ORS 181A.195, 181A.200, 409.050

Statutes/Other Implemented: ORS 181A.195, 181A.200, 409.010

AMEND: 407-007-0080

RULE SUMMARY: This rule explains the process of contesting an adverse outcome of a criminal records check for subject individuals subject to OAR 407-007-0000 to 407-007-0100. Updates to this rule, made in a temporary filing effective 6/25/2021, included changes match current Oregon statutes. The Department proposes to make these changes permanent.

CHANGES TO RULE:

407-007-0080

Contesting a Final Fitness Determination ¶¶

- (1) An SI may contest a final fitness determination of denied or approved with restrictions pursuant to OAR 407-007-0070. ¶¶
- (2) An SI who is already employed by the Department at the time of the final fitness determination may appeal through applicable personnel rules, policies, and collective bargaining provisions. The SI's decision to do so is an election of remedies as to the rights of the SI with respect to the fitness determination and constitutes a waiver of the appeal process described in this rule. ¶¶
- (3) This appeal process is conducted in accordance with OAR 125-007-0300, ORS 183.411 to 183.497 and the Attorney General's Uniform and Model Rules of Procedure for the Office of Administrative Hearings (OAH), OAR 137-003-0501 to 137-003-0700. ¶¶
- (4) During the appeal process, the final fitness determination remains in effect. ¶¶
 - (a) If an SI is denied, then the SI may not work, volunteer, be employed, or otherwise perform in positions covered by these rules. ¶¶
 - (b) If an SI has an approval with restrictions, then the SI may only work under the terms of the restriction listed on the notice of final fitness determination during on the appeal. ¶¶
- (5) A positive change of the final fitness determination at any time during the appeal process does not guarantee employment or placement. A positive change is either: ¶¶
 - (a) A denial changing to an approval or an approval with restrictions; or ¶¶
 - (b) An approval with restrictions changing to an approval. ¶¶
- (6) The SI may represent himself or herself or have legal representation during the appeal process. In this rule, the term "SI" shall be considered to include the SI's legal representative if the SI has provided the Department with such information. ¶¶
 - (a) If the SI is a member of a bargaining unit, the SI may represented by the certified or recognized exclusive representative of the bargaining unit. ¶¶
 - (b) For all other SIs, the SI's legal representative may be an Oregon licensed attorney. ¶¶
- (7) A hearing representative may represent BCU in contested case hearings. Alternatively, BCU may be represented by the Office of the Attorney General. ¶¶
- (8) Any contested case hearing request must be received by the Department by 11:59 p.m. on the due date, or if mailed, postmarked by 11:59 p.m. on the due date. ¶¶
 - (a) To request a contested case hearing the SI shall complete, sign, and date the Hearing Request form. ¶¶
 - (b) The completed, signed and dated form must be received by the Department on or before the due date. The due date is 30 calendar days after the effective date of action on the notice of fitness determination. ¶¶
 - (c) If a request for a contested case hearing is not timely, the Department shall determine, based on a written statement from the SI and available information, if there is good cause to proceed with the appeal process. ¶¶
 - (d) The Department may refer an untimely request to OAH for a contested case hearing solely on the issue of timeliness of the contested case hearing request. ¶¶
- (9) After the Department receives the SI's request for a contested case hearing, the Department may conduct an administrative review before referring the SI's request for a contested case hearing to OAH. ¶¶
 - (a) The administrative review is not open to the public. ¶¶
 - (b) The SI must participate in the administrative review. ¶¶

- (c) In addition to any other method of communication, the Department shall provide the SI with written correspondence that initiates the administrative review process ("Correspondence"). The Correspondence shall include a due date for the SI. ¶
- (d) Participation by the SI may include but is not limited to providing additional information or additional documents requested on or before the due date specified in the Department's Correspondence. ¶
- (e) Any response to the Department's Correspondence must be received by the Department by 11:59 p.m. on the due date, or if mailed, postmarked by 11:59 p.m. on the due date. ¶
- (f) For the purposes of this rule, failure to participate in the administrative review means that the SI does not respond in any way to the Department's Correspondence by the specified due date. Failure to participate in the administrative review process shall result in a dismissal order pursuant to paragraph (13)(b)(C) of this rule. ¶
- (g) The outcome of an administrative review is a new fitness determination. ¶
- (A) If the hearing representative makes a positive change to approved, BCU shall issue an amended notice to the SI and Human Resources. ¶
- (B) If the hearing representative makes a positive change from denial to approval with restrictions, BCU shall issue an amended notice to the SI and Human Resources. If the SI does not continue with a contested case hearing, BCU shall issue a final order. ¶
- (C) If the hearing representative maintains the outcome of the final fitness determination, or changes an approval with restrictions to a denial, BCU will refer the contested case hearing request to OAH. ¶
- (10) The SI may not challenge a finding of criminal conviction that was a basis for the adverse outcome under this rule. The SI has the right to contest the weight the Department has given to: ¶
- (a) The evidence; ¶
- (b) The factors used in the weighing test; or ¶
- (c) Any other information used in making the fitness determination. ¶
- (11) The Department may conduct additional criminal records checks during the appeal process to update or verify the SI's criminal records. If needed, the Department shall amend the notice of fitness determination during the appeal process while still maintaining the original hearing rights and deadlines as far as allowed under the Model Rules of Procedure for OAH. ¶
- (12) An administrative law judge from OAH conducts the contested case hearing. ¶
- (a) The administrative law judge shall make a new fitness determination based on the evidence in the contested case hearing record. ¶
- (b) The only remedy that may be awarded is a new fitness determination of approved; denied; or if allowed pursuant to OAR 407-007-070(1)(b), approval with restrictions. ¶
- (c) Under no circumstances shall the Department be required to place an SI in any position, nor shall the Department be required to accept services or enter into a contractual agreement with an SI. ¶
- (13) The result of an appeal is a final order. ¶
- (a) In the following situations, the notice of fitness determination becomes the final order by default as if the SI never requested a hearing: ¶
- (A) Failure to request a hearing in the time allotted in this rule. No other document shall be issued after the notice of fitness determination. ¶
- (B) Withdrawal of the request for hearing at any time during the appeal process. ¶
- (b) The Department shall issue an order dismissing the appeal (a "dismissal order") in the following circumstances: ¶
- (A) The Department shall dismiss a contested case hearing request if the administrative review results in a positive outcome. The only exception to the Department issuing a dismissal order is when the SI proceeds to contested case hearing because the administrative review changed fitness determination from denial to approval with restrictions. ¶
- (B) The SI may withdraw a hearing request verbally or in writing at any time before the issuance of a final order. A dismissal order due to a withdrawal is effective the date the withdrawal is received by the Department or OAH. The SI may cancel the withdrawal in writing within 14 calendar days after the date of withdrawal. ¶

(C) The Department shall dismiss a hearing request when the SI fails to participate in the administrative review. Failure to participate as defined in (9)(f) of this rule shall result in termination of hearing rights through a dismissal order. ¶

(i) The dismissal order is effective on the date the Department mails the dismissal order. ¶

(ii) The Department shall review a good cause request to reinstate hearing rights if received in writing by the Department within 14 calendar days from the date of the dismissal order. ¶

(D) The Department shall dismiss a hearing request when the SI fails to appear at the time and place specified for the contested case hearing. ¶

(i) The dismissal order is effective on the date scheduled for the hearing. ¶

(ii) The Department shall review a good cause request to reinstate hearing rights if received in writing by the Department within 14 calendar days from the date of the dismissal order. ¶

(c) After a contested case 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's Director or designee shall consider the exceptions and serve a final order, or request a written response or a revised proposed and final order from the administrative law judge. ¶

(14) Final orders, including dismissal and default orders, are subject to reconsideration or rehearing petitions within 60 calendar days after the final order is served, pursuant to OAR 137-003-0675. ¶

(15) All final orders are subject to judicial review under ORS 183.482 in the Court of Appeals.

Statutory/Other Authority: ORS 181A.195, 181A.200, 409.050

Statutes/Other Implemented: ORS 181A.195, ORS 443.008, 181A.200, 183.341, 409.010

AMEND: 407-007-0200

RULE SUMMARY: This rule introduces the background check rules for providers licensed, certified, or otherwise regulated by the Oregon Department of Human Services. The Department proposed to add "Oregon" to "Department of Human Services."

CHANGES TO RULE:

407-007-0200

Purpose and Scope ¶¶

(1) The purpose of these rules, OAR 407-007-0200 to 407-007-0370, is to supplement OAR 125-007-0200 to 125-007-0330 with guidelines and requirements specific to background checks for Oregon Department of Human Services (Department or ODHS) and Oregon Health Authority (Authority) subject individuals (SIs). These rules provide for the reasonable screening under ORS 181A.195, 181A.200, 409.027, and 413.036 of SIs to determine if they have a history of specific criminal or abusive behavior identified in federal or state law or rules such that they should not be allowed to work, volunteer, be employed, reside, or otherwise perform in positions covered by these rules.¶¶

(2) These rules apply to evaluating potentially disqualifying convictions and conditions of an SI when conducting fitness determinations based upon such information. The fact that an SI is approved does not guarantee employment or placement. These rules do not apply to individuals subject to OAR 407-007-0000 to 407-007-0100 (ODHS Employees, Volunteers, and Contractors) or 407-007-0400 to 407-007-0460 (Abuse Check Rules for Department Employees and Volunteers).¶¶

(3) Providers for the Department and the Authority are subject to criminal records and abuse checks. The Authority authorizes the Department to act on its behalf in carrying out criminal and abuse checks associated with programs or activities administered by the Authority. References in these rules to the Department or Authority shall be construed to be references to either or both agencies.

Statutory/Other Authority: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, 409.050, 410.020, 411.060, 411.122, 413.036, 418.016, 418.640, 441.055, 443.730, 443.735, 678.153

Statutes/Other Implemented: ORS 181A.195, 181A.200, 183.459, ~~409.010~~, 409.025, 409.027, 411.060, 411.122, 413.036, 409.010, 443.004

AMEND: 407-007-0210

RULE SUMMARY: This rule lists the definitions of terms and words used in OAR 407-007-0200 to 407-007-037. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the new background check system, ORCHARDS. The Department is proposing to make the temporary changes permanent, and well as changes to clarify current practice.

CHANGES TO RULE:

407-007-0210

Definitions ¶¶

OAR 125-007-0210 and 407-007-0010 include definitions for words and terms used in OAR chapter 407, division 007. The following definitions apply specifically to OAR 407-007-0200 to 407-007-0370: ¶¶

(1) "Authorized Agency" as defined in ORS 181A.215 or described in these rules appointing authority" means an individual designated by the qualified entity (QE) who is responsible for appointing QE designees (QEDs).

Examples include but are not limited to human resources staff with the authority to offer and terminate employment, a business owner, a member of the board of directors, a director, or a program administrator. ¶¶

(2) "Credible evidence" means available facts, when viewed objectively with the surrounding circumstances, would cause a reasonable person to believe that an event has occurred. ¶¶

(3) "Ineligible due to ORS 443.004" means BCU has determined that an SI, subject to ORS 443.004 and either OAR 407-007-0275 or 407-007-0277, has one or more convictions that prohibit the SI from holding the position listed in the background check request. ¶¶

(4) "Mandatory exclusion" means BCU has determined that an SI, subject to federal law or regulation, has one or more
"Good Standing" means the SI is in an approved status on the registry (see OAR 407-007-0600 to 407-007-0640) and may continue to work without active supervision (see OAR 407-007-0315(7)) in an approved status in all any current positions listed for the SI. ¶¶

(4) "Ineligible" means BCU has determined that an SI has one or more convictions that prohibit the SI from holding the position listed in the background check request. Ineligibility is due to either the SI being subject to: ¶¶

(a) ORS 443.004 and either OAR 407-007-0275 or 407-007-0277; or ¶¶

(b) A federal law or regulation that includes mandatory exclusions. ¶¶

(5) "Mandatory exclusion" means a convictions or conditions that from a federal law, regulation or directive that would prohibit the SI from holding the position listed in the background check request. ¶¶

(56) "Portability" means the ability of an SI to use one approved background check for a defined period of time for immediate hirability for a position offered by a QE within a group as determined by the Department. See OAR 407-007-0600 to 407-007-0640. ¶¶

(7) "Potentially disqualifying abuse" means abuse that is considered potentially disqualifying in a background check pursuant to OAR 407-007-0290(11). If formal review or appeal rights are offered to the alleged perpetrator (SI), BCU may consider the abuse as potentially disqualifying after these rights are completed or timed out. ¶¶

(68) "Proctor foster parent" means an individual who is an applicant for certification or recertification of a proctor foster home by a child-caring agency pursuant to OAR 413-215-0301 to 413-215-0396. ¶¶

(79) "Qualified entity (QE)" means a community mental health or developmental disability program, local health department, or an individual, 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 (see ORS 181A.200). ¶¶

(810) "QE designee (QED)" means an approved SI appointed by the QE's appointing authority to handle background checks on behalf of the QE. ¶¶

(911) "QE Initiator (QEI)" means an approved SI to whom BCU has granted access to BCU' online background check system for one QE for the purpose of entering background check request data. ¶¶

(102) "Subject individual (SI)" means an individual on whom BCU may conduct a criminal records check or an abuse check or both, and from whom BCU may require fingerprints for the purpose of conducting a national

criminal records check.¶

(a) An SI includes any of the following:¶

(A) An individual who is licensed, certified, registered, or otherwise regulated or authorized for payment by the Department or Authority and who provides care.¶

(B) An employee, contractor, temporary worker, or volunteer who provides care or has direct contact with clients, client information, or client funds within or on behalf of any entity or agency licensed, certified, registered, or otherwise regulated by the Department or Authority.¶

(C) Any individual who is paid directly or indirectly with public funds who has or will have direct contact with recipients of:¶

(i) Services within an adult foster home (defined in ORS 443.705); or¶

(ii) Services within a residential facility (defined in ORS 443.400).¶

(D) Any individual ~~who works in a facility~~ secured by any residential care or assisted living facility licensed by the Department in accordance with OAR chapter 411 division 54 through the services of a personnel services or staffing agency who works and provides care or has direct contact with clients, client information, or client funds.¶

(E) Any individual secured by any residential care or assisted living facility licensed by the Department in accordance with OAR chapter 411 division 85 through the services of a personnel services or staffing agency.¶

~~(E) Any individual who works in a facility who works~~ and provides care, or has direct contact with clients, client information, or client funds ~~secured by any nursing facility through the services of a personnel services or staffing agency.~~¶

(F) Except as excluded in section (102)(b)(C) and (D) of this rule, an individual who lives in a facility that is licensed, certified, registered, or otherwise regulated by the Department to provide care. The position of this SI includes but is not limited to resident manager, household member, boarder, or tenant.¶

(G) Any referral agent, and any employee of a referral agent of a long term care referral entity pursuant to OAR 411-058-0000 to 411-058-0100 who comes into direct contact with clients.¶

(H) For child foster homes licensed by the Department's Developmental Disabilities (DD) programs, or child foster or adoptive homes governed by OAR chapter 413, division 215:¶

(i) A foster parent or proctor foster parent;¶

(ii) An adoptive parent applicant or an approved adoptive parent;¶

(iii) A household member in an adoptive or foster home 18 years of age and over;¶

(iv) A household member in an adoptive or foster home under 18 years of age if there is reason to believe that the household member may pose a risk to children placed in the home; and¶

(v) A respite care provider or alternate caregiver.¶

(I) An individual with contact with clients, client information, or client funds, who is an employee, contractor, or volunteer for a child-caring agency governed by OAR chapter 413 division 215; an In-Home Safety and Reunification Services (ISRS) program; a Strengthening, Preserving and Reunifying Families (SPRF) provider; or a system of care contractor providing child welfare services pursuant to ORS chapter 418.¶

(J) A homecare worker as defined in ORS 410.600, a personal support worker as defined in ORS 410.600, a personal care services provider, or an independent provider employed by a Department or Authority client who provides care to the client if the Department or Authority helps pay for the services.¶

(K) Pursuant to OAR 461-165-0180, a child care provider reimbursed through the Department's child care program, associated individuals, and other individuals in child care facilities that are exempt from certification or registration by the Office of Child Care of the Oregon Department of Education. Child care provider SIs include:¶

(i) The child care provider;¶

(ii) Employees of the child care provider;¶

(iii) Any individual the child care provider uses to supervise a child in the absence of the child care provider;¶

(iv) Each individual 16 years of age or older who lives in the provider's home if child care is provided in the home;¶

(v) Each individual who visits the provider's home during the hours care is provided and may have unsupervised access to a child in care.¶

- (L) An appointing authority, QED, or QEI associated with any entity or agency licensed, certified, registered, otherwise regulated by the Department, or subject to these rules.¶
- (M) An individual providing on the job certified nursing assistant classes to staff within a long term care facility.¶
- (N) A student enrolled in a Board of Nursing approved nursing assistant training program in which the instruction and training occurs solely in a nursing facility.¶
- (O) Except for those excluded under section (102)(b)(B), a student or intern who provides care or has direct contact with clients, client information, or client funds within or on behalf of a QE.¶
- (P) Any individual serving as an owner, operator, or manager of a room and board facility pursuant to OAR chapter 411, division 68.¶
- (Q) An employee providing care to clients of the Department's Aging and People with Disabilities (APD) programs who works for an in-home care agency as defined by ORS 443.305 which has enrolled to deliver Medicaid funded services as described in OAR 411-033-0000 to 411-033-0030 for ~~DH~~Department clients.¶
- (R) Any individual who is required to complete a background check pursuant to Department or Authority program rules ~~or, if the requirement is within the Department or Authority's statutory authority. Specific statutory authority or reference to these rules and who is subject to a background check must be specified in the program rules. Whether hiring on a preliminary basis, restricted approval, or how often a recheck is needed may also be specified in the program rules.~~ The exceptions in section (12)(b) do not apply to these SIs.¶
- (S) Any individual who is required to complete a background check pursuant to a contract with the Department or Authority to provide care to vulnerable individuals, if the requirement is within the Department or Authority's statutory authority. Specific statutory authority or reference to these rules and the positions under the contract subject to a background check must be specified in the contract. Whether hiring on a preliminary basis, restricted approval, or how often a recheck is needed may also be specified in the contract. The exceptions in section (102)(b) do not apply to these SIs.¶
- (b) An SI does not include:¶
- (A) Any individual under 16 years of age.¶
- (B) A student or intern in a clinical placement at a clinical training setting subject to administrative rules implemented under ORS 413.435 and OAR 409-030-0100 to 409-030-0250.¶
- (C) Department, Authority, or QE clients. The only circumstance in which BCU shall 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 sections (102)(a)(A)-(E) and (102)(a)(G)-(RS) of this rule, or if the facility is dually licensed for different populations of vulnerable individuals.¶
- (D) Individuals working in child care facilities certified or registered by the Office of Child Care of the Oregon Department of Education.¶
- (E) Volunteers providing any care or services for a QE's special event lasting no more than 2 weeks whose access to clients is no more than three days within the two-week period. These volunteers must always be actively supervised in accordance with OAR 407-007-0315 and have no unsupervised contact with clients.¶
- (F) Individuals employed by a private business that provides services to clients and the general public and is not regulated by the Department or Authority.¶
- (G) Individuals employed by a business that provides appliance or structural repair for clients and the general public and who are temporarily providing these services in a licensed or certified QE. The QE shall ensure active supervision of these individuals while on QE property and the QE may not allow unsupervised contact with QE clients or residents. This exclusion does not apply to a business that receives funds from the Department or Authority for care provided by an employee of the business.¶
- (H) Individuals employed by a private business in which a client of the Department or Authority is working as part of a Department- or Authority-sponsored employment service program. This exclusion does not apply to an employee of a business that receives funds from the Department or Authority for care provided by the employee.¶
- (I) Employees, contractors, students, interns, and volunteers working in hospitals, ambulatory surgical centers, outpatient renal dialysis facilities, and freestanding birthing centers, as defined in ORS 442.015, and special

inpatient care facilities as defined by the Authority in administrative rule.¶¶

(J) Employees, contractors, students, interns, and volunteers working in home health agencies, in-home care agencies, or hospice programs as defined by the Authority in administrative rule.¶¶

(K) Volunteers, who are not under the direction and control of a licensed, certified, registered, or otherwise regulated QE.¶¶

(L) 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) Individuals working in restaurants or at public swimming pools.¶¶

(N) Hemodialysis technicians.¶¶

(O) Employees, contractors, temporary workers, or volunteers who provide care, or have direct contact with clients, client information, or client funds of an alcohol and drug program that is certified, licensed, or approved by the Authority's Health Systems Division to provide prevention, evaluation, or treatment services. This exclusion does not apply to programs specifically required by other Authority program rules to conduct criminal records checks in accordance with these rules.¶¶

(P) Individuals working for a transit service provider which conducts background checks pursuant to ORS 267.237.¶¶

(Q) Emergency medical technicians and first responders certified by the Authority's Emergency Medical Services and Trauma Systems program.¶¶

(R) Employees, contractors, temporary workers, or volunteers of continuing care retirement communities registered under OAR chapter 411, division 67.¶¶

(S) Individuals hired by or on behalf of a resident in a QE to provide care privately to the resident.¶¶

(T) An employee, contractor, temporary worker, or volunteer who provides care or has direct contact with specific clients, client information, or client funds within or on behalf of any entity or agency licensed, certified, registered, or otherwise regulated by the Department or Authority, where the clients served permanently reside in another state.

Statutory/Other Authority: ORS 181A.200, 409.027, 409.050

Statutes/Other Implemented: ORS 181A.195, 181A.200, 409.010, 409.027, 409.027200, 409.027, ORS 181A.195, 443.004, ORS 418.248

AMEND: 407-007-0220

RULE SUMMARY: This rule explains who is required to get a background check under OAR 407-007-0200 to 407-007-0370 and when. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the new background check system, ORCHARDS, and to enact 2021 Or Law chapter 198 (2021 SB 280). The Department is proposing to make the temporary changes permanent.

CHANGES TO RULE:

407-007-0220

Background Check Required ¶¶

(1) An SI must have a background check in the following circumstances:¶¶

(a) An individual who becomes an SI on or after the effective date of these rules.¶¶

(b) The SI changes employers to a different QE.¶¶

(c) The individual, whether previously considered an SI or not, changes positions under the same QE, and the new position requires a background check.¶¶

(d) The individual, whether previously considered an SI or not, changes Department or Authority-issued licenses, certifications, or registrations, and the license, certification, or registration requires a background check under these rules.¶¶

(e) For a student enrolled in a nursing facility nursing assistant training program for employment at the facility, a new background check is required when the student is first enrolled in the training program to be in contact with nursing facility patients, and again if the student becomes an employee at the facility unless the first background check results in placement on the registry good standing in the background check registry and portability pursuant to OAR 407-007-0600 to 407-007-0640.¶¶

(f) A background check is required by federal or state laws or regulations, other Department or Authority administrative rules, or by contract with the Department or Authority.¶¶

(g) When BCU or the QE has reason to believe that a background check is justified, if allowed by statute or rule. Examples include but are not limited to:¶¶

(A) Credible evidence of new potentially disqualifying convictions or conditions. Pursuant to OAR 407-007-0620(6), an SI must be removed from the registry BCU shall either immediately (and is no longer in remove an SI's portability, revoke an SI's good standing), or both if BCU receives credible evidence indicating that the SI has new potentially disqualifying convictions or conditions.¶¶

(B) A lapse in working or volunteering in a position under the direction and control of the QE but the SI is still considered in the position. For example, an extended period of leave by an SI. The QE determines the need for a background check.¶¶

(C) Quality assurance monitoring by the Department or Authority of a previously conducted criminal records check or abuse check.¶¶

(2) If the SI is subject to a background check due to involvement with the foster or adoptive placement of a child and:¶¶

(a) Is subject to the Interstate Compact on Placement of Children (ORS 417.200 and OAR 413-040-0200 to 413-040-0330), the background check must comply with Interstate Compact requirements.¶¶

(b) Is subject to the Inter-County Adoption Act of 2000 (42 USC 14901 et seq.), the background check must comply with federal requirements and ORS 417.262.¶¶

(3) If QEs, Department program rules, or Authority program rules require an SI to report any new arrests, charges, or convictions, the QE may determine if personnel action is required if the SI does not report. Personnel action may include a new background check if allowed by statute or rule.¶¶

(4) A homecare worker or personal support worker, as defined in ORS 410.600, is subject to section (1) of this rule. However, a homecare worker or personal support worker does not need a new background check when adding new client employers by meeting the following requirements: the homecare worker or personal support worker must have:¶¶

- (a) A Department background check notice of final fitness determination dated within the recheck period according to Department program rules showing that the homecare worker or personal support worker has been:¶
- (A) Approved;¶
 - (B) Approved with restrictions that ~~allow for~~ do not prohibit additional clients; or¶
 - (C) Approved but not ~~listed on the registry~~ having portability pursuant to OAR 407-007-0600 to 407-007-0640; and.¶
- (b) The background check notice of final fitness determination lists a worksite of "various," "various clients," "statewide," or similar wording.¶
- (5) A personal care services provider, lifespan respite or other respite care provider, or an independent provider paid with Department or Authority funds is subject to section (1) of this rule. However, an SI in these positions may change or add clients within the same QE, Department, or Authority district without a new background check if the prior, documented criminal records check or abuse check conducted within the previous 24 months through the Department or Authority has been:¶
- (a) Approved;¶
 - (b) Approved with restrictions that ~~allow for~~ do not prohibit additional clients; or¶
 - (c) Approved but not ~~listed on the registry~~ having portability pursuant to OAR 407-007-0600 to 407-007-0640.¶
- (6) A child care provider SI as described in OAR 407-007-0210(102)(a)(K) is subject to section (1) of this rule. However, this SI does not need a new background check when changing or adding clients if this SI has been approved without restrictions within the required recheck period according to Department program rules.¶
- (7) If an SI remains with a QE in the same position listed in the background check request and the QE merges with another QE, is sold to another QE, or changes names, the SI does not need a new background check. The changes to the QE may be noted in documentation attached to the notice of fitness determination but do not warrant a new background check.¶
- (8) For a student enrolled in a nursing facility nursing assistant training program for employment at the facility, a new background check is not required at graduation from the training program or at the granting of certification by the Board of Nursing.¶
- (9) The SI on the background check registry in good standing maintained under OAR 407-007-0600 to 407-007-0640 is subject to section (1) of this rule when the SI's new background check being considered is not for a position that would result in placement on the background check registry maintained under OAR 407-007-0600 to 407-007-0640 if approved.¶
- (10) The restrictions on criminal records checks in this section may exempt an SI from background checks required under section (1) of this rule as determined by the Department pursuant to ORS 443.004(1)(b).¶
- (a) This section applies to an SI subject to ORS 443.004 who is:¶
 - (A) An employee of a residential facility or an adult foster home;¶
 - (B) Any individual who is paid directly or indirectly with public funds who has or will have contact with a recipient of support services or a resident of an adult foster home or a residential facility; and¶
 - (C) A home care worker or a personal support worker as defined in ORS 410.600.¶
 - (b) The Department shall complete not more than one criminal records check every ~~two year~~ 18 months on an SI subject to this section, effective as of the completion of the SI's first background check after the implementation of ORS 443.004 (1)(b) (Or Law 20219, chapter 423, section 2), ~~on September 29 198), on June 8, 20219.~~¶
 - (c) A criminal records check, as part of a new background check, may be completed more often only if the Department:¶
 - (A) Receives credible evidence of a new criminal conviction;¶
 - (B) Receives credible evidence of potentially disqualifying abuse;¶
 - (C) Is required by federal law to conduct more frequent criminal record checks; ~~or~~¶
 - (D) Is notified by a QE and an SI has changed position or duties for which there are different criminal records check requirements; or¶
 - (E) Determines that it would be burdensome for an SI to wait for a new criminal records check, including but not

limited to:¶

(i) The Department receives credible evidence of a change in circumstances that could positively impact a previous fitness determination:¶

(ii) The SI is seeking certification, licensure, or some other qualification associated with his or her job that requires a background check:¶

(d) If the Department determines that a new fitness determination is necessary and a new criminal records check is not allowed, the Department may complete a new abuse check and use information from the most recent criminal records check completed on the SI in the Department's records. An example of when a new fitness determination is necessary, and a new criminal records check is not allowed, is when BCU learns of a new potentially disqualifying condition.¶

(e) If an SI changes positions while staying with the same QE and the new position is not subject to the registry under OAR 407-007-0600 to 407-007-0640, the QED shall document that no new background check may be completed for the new position pursuant to OAR 407-007-0220(102)(b).¶

(f) If the SI is applying for a position that requires a background check under these rules but is not subject to ORS 443.004, the restrictions in this section do not apply and do not count as criminal records checks towards this section.¶

(11) Background checks are completed on SIs who otherwise meet the qualifications of the position listed on the background check request, the position description completed by the QE, and the program rules governing the QE and position. A background check may not be used to screen applicants for a position or who do not meet such qualifications.

Statutory/Other Authority: ORS 181A.200, ORS 409.027, 409.050

Statutes/Other Implemented: ORS 181A.200, ORS 409.027, ORS 181A.195, ~~409.040~~, 443.004

AMEND: 407-007-0250

RULE SUMMARY: This rule details the background check process for individuals subject to OAR 407-007-0200 to 407-007-0370. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the new background check system, ORCHARDS and to clarify current practice. The Department is proposing to make the temporary changes permanent.

CHANGES TO RULE:

407-007-0250

Background Check Process ¶

~~(1) BCU shall conduct~~ In order to conduct a background check on an SI, BCU must receive authorization from the SI allowing the criminal records check and abuse check to proceed. If the SI refuses to provide authorization for the background check, BCU terminates the background check immediately and the QE may not allow the SI to work, volunteer, be employed, reside, or otherwise perform in positions covered by these rules. ¶

~~(2) BCU conducts~~ a criminal records check on an SI through LEDS maintained by the Oregon State Police (OSP) and shall handle criminal offender information in accordance with ORS chapter 181A and the rules adopted thereto (see OAR chapter 125, division 007; and chapter 257, division 15). ¶

~~(23) If a national criminal records check is necessary, OSP shall provide~~ BCU results of national criminal records checks conducted pursuant to ORS 181A.195, including fingerprint identification, through the FBI. ¶

~~(34) The criminal records check may include one or more types of criminal records checks as defined in OAR 407-007-0010. The date of the last criminal records check completed before the final fitness determination shall be considered the date of the background check's criminal records check.~~ ¶

~~(45) BCU shall conduct~~s abuse checks on an SI using available abuse investigation reports and associated documents. ¶

~~(56) A QE and SI shall use CRIMORCHARDS to request a background check. In addition to information required in accordance with~~ OAR 125-007-0220, the background check request shall include the following information regarding an SI: ¶

~~(a) Legal name and aliases;~~ ¶

~~(b) Date of birth;~~ ¶

~~(c) Address and recent residency information;~~ ¶

~~(d) Driver license or identification card information;~~ ¶

~~(e) Position title and description of duties to be considered;~~ ¶

~~(f) Indication of the SI's direct contact with any of the following:~~ ¶

~~(A) Children (for a child-caring agency governed by OAR chapter 413 division 215, children includes an individual who is under 21 years of age who is residing in or receiving care or services);~~ ¶

~~(B) Adults;~~ ¶

~~(C) Seniors (65 years and older);~~ ¶

~~(D) Confidential information;~~ ¶

~~(E) Secure Facilities;~~ ¶

~~(F) Finances or financial records; or~~ ¶

~~(G) Information Technology Systems.~~ ¶

~~(g) Worksite location or locations where the SI will be working;~~ ¶

~~(h) Disclosure of all potentially disqualifying criminal history pursuant to OAR 407-007-0281 and 407-007-0290;~~ ¶

~~(A) The SI must disclose~~ While the SI may provide minimal information to meet this requirement, the Department finds that more details from the SI provides positive information for the weighing test in OAR 407-007-0300. The SI may disclose details of potentially disqualifying arrests, charges, convictions, and any other conditions at a minimum, and may disclose all arrests, charges, and convictions regardless of outcome or when the arrests, charges, or convictions occurred. Disclosure includes any juvenile or adult record of custody, arrests, charges, or

the outcome of custody, arrests, or charges against a juvenile or adult.¶

(B) The disclosed crimes and the dates must reasonably match the SI's criminal offender information and other criminal history information, as determined by BCU.¶

(C) The SI is not required to disclose any criminal history which has been expunged or set aside by a court in any jurisdiction. However, if the SI does disclose expunged or set aside criminal history, the Department may not consider the criminal history as potentially disqualifying or in a weighing test if the Department has proof that the criminal history has been expunged or set aside by a court in any jurisdiction.¶

(D) The Department may only consider criminal history as allowed in the weighing test, OAR 407-007-0300.¶

(e) Disclosure of other information to be considered in the event of a weighing test.¶

(A) The SI may provide mitigating information for BCU to review in a weighing test.¶

(B) BCU may require the SI to provide other information as needed to conduct the weighing test.¶

(f) For an SI who is a proctor foster parent:¶

(A) The SI must provide a release of information allowing the Department to provide the QE with information regarding the open or pending abuse investigations or founded or substantiated allegations of abuse against the SI.¶

(B) The SI must also disclose:¶

(i) Any currently open or pending child or adult abuse investigations in which the SI is reported or alleged to be responsible for the abuse;¶

(ii) Any child or adult abuse investigations with an outcome of founded or substantiated in which the SI is determined to have been responsible for the abuse; and¶

(iii) Any restraining order or protective orders against the SI.¶

(C) If the SI has any of the following, the Department shall provide the QE notification:¶

(i) Information regarding the open or pending abuse investigations in which the SI is a reported or alleged perpetrator.¶

(ii) Information regarding substantiated allegations of abuse against the SI.¶

(iii) Confirmation of the SI being certified or licensed by the Department as a child foster home parent.¶

(g) For child care provider SIs listed in OAR 407-007-0210(812)(a)(K), the SI must disclose any involvement in protective services or abuse investigations regarding children or vulnerable adults.¶

(6) The background check request shall include the following notices to the SI:¶

(a) A notice regarding disclosure of Social Security number indicating that:¶

(A) The SI's disclosure is voluntary; and¶

(B) The Department requests the Social Security number for the purpose of positively identifying the SI during the criminal records check process.¶

(b) A notice that the SI may be subject to fingerprinting as part of a criminal records check.¶

(c) A notice that BCU shall conduct an abuse check on the SI. Unless required by rule, an SI is not required to disclose any history of potentially disqualifying abuse, but may provide BCU with mitigating or other information.¶

(d) A notice that the SI has the right to challenge criminal or abuse history through the local source of the information.¶

(7) Using identifying information submitted in a background check request, BCU shall conduct an abuse check to determine if an SI has potentially disqualifying abuse. If required by federal law or regulation, the abuse check shall include an out of state child abuse check.¶

(8) BCU shall conduct an Oregon criminal records check. Using information submitted on the background check request, BCU may obtain criminal offender information from LEDS and may request other criminal history information as needed.¶

(9) BCU may conduct a fingerprint-based national criminal records check.¶

(a) A fingerprint-based national criminal records check may be completed under any of the following circumstances:¶

(A) The SI has been outside Oregon for 60 or more consecutive days during the previous five years.¶

- (B) The criminal offender information from the LEDS check, SI disclosures, or any other criminal history information obtained by BCU indicate there may be criminal records outside of Oregon.¶
- (C) The criminal offender information from the LEDS check, SI disclosures, or any other criminal history information obtained by BCU do not provide enough information to confirm that there are no criminal records outside of Oregon.¶
- (D) The SI has an out-of-state driver license or out-of-state identification card.¶
- (E) BCU or the QE has reason to question the identity of the SI or the information on the criminal record found in LEDS.¶
- (F) A fingerprint-based criminal records check is required by federal or state laws or regulations, other Department or Authority rules, or by contract with the Department or Authority.¶
- (G) The SI is an employee of an agency which the Centers for Medicare and Medicaid Services has designated high risk pursuant to 42 CFR 424.518.¶
- (H) Any SI applying to be or renewing the position with regard to child adoption or children in foster care licensed by the Department or child-caring agencies. Renewing SIs do not need a fingerprint-based criminal records check if BCU has a record of a previous fingerprint-based criminal records checks that is within three years from the date of the current background check request. Applicable SI positions include:¶
 - (i) A relative caregiver, foster parent, proctor foster parent, or adoptive parent in Oregon;¶
 - (ii) An adult household member in an adoptive or child foster home 18 years of age and over;¶
 - (iii) A household member in an adoptive or child foster home under 18 years of age if there is reason to believe that the household member may pose a risk to children placed in the home; or¶
 - (iv) A respite care provider or alternate caregiver in an adoptive or child foster home.¶
- (I) BCU has reason to believe that fingerprints are needed to make a final fitness determination.¶
- (b) BCU shall request a fingerprint capture for an SI under the age of 18 in accordance with OAR 125-007-0220(3).¶
- (c) The SI shall complete and submit a fingerprint capture when requested by BCU within the time frame indicated in a written notice. BCU shall send the request to the QE and the QED shall notify the SI. BCU may require new fingerprint capture and its submission if previous fingerprint captures result in a rejection by OSP or the FBI.¶
- (101) For child care provider SIs listed in OAR 407-007-0210(102)(a)(K), a background check shall include:¶
 - (a) A fingerprint-based national criminal records check;¶
 - (b) A search of the National Crime Information Center's National Sex Offender Registry and the Oregon state sex offender registry (these checks are included in the Oregon and fingerprint based national criminal records check); and¶
 - (c) In any state where the SI has resided for 60 or more consecutive days during the previous five years:¶
 - (A) Research for other criminal history information;¶
 - (B) An abuse check of child abuse and neglect registries;¶
 - (C) A state sex offender registry check.¶
- (142) For SIs who are subject to the Adam Walsh Act of 2006, or SIs who are employees of qualified entities which are subject to the federal 2018 Family First Prevention Services Act and which receive title IV-E funds, a background check shall include:¶
 - (a) A fingerprint-based national criminal records check;¶
 - (b) In any state where the SI has resided for 60 or more consecutive days during the previous five years, an abuse check of child abuse and neglect registries.¶
- (123) BCU requires that due diligence be exercised in complying with national criminal records check requirements including fingerprints. However, if BCU determines that an SI is unable to submit fingerprints, BCU shall document the circumstances that led to the decision to waive fingerprinting and proceed with obtaining other criminal history information from states based on SI's residential history and disclosures in lieu of a fingerprint-based criminal records check as required in this rule. A fingerprint-based national criminal records may be waived due to inability to submit fingerprints unless fingerprints are required by state or federal laws or regulations. Reasons for inability to submit fingerprints include but are not limited to:¶

- (a) A physical condition in which all the SI's fingerprints are illegible or missing, or which makes the capture of fingerprints impossible;¶
 - (b) A mental or psychological condition which makes the capture of fingerprints impossible;¶
 - (c) Undue safety risk to the SI or other individuals in capturing the fingerprints.¶
 - (134) BCU may also research other criminal history information from other states instead of or in addition to a national criminal records check. Reasons for such research include but are not limited to:¶
 - (a) When BCU has reason to believe that out-of-state criminal records may exist and a national criminal records check cannot be accomplished.¶
 - (b) When BCU has been unable to complete a national criminal records check due to illegible fingerprints ~~or the reasons in section (9).~~¶
 - (c) When the national criminal records check results show incomplete information about charges or criminal records without final disposition.¶
 - (d) When there is indication of residency or criminal records in a state that does not submit all criminal records to the FBI.¶
 - (e) When, based on available information, BCU has reason to believe that other criminal history information regarding the SI is present in another state.¶
 - (145) The criminal records check may include one or both types of criminal records checks as defined in OAR 407-007-0010. The date of the last criminal records check completed before the final fitness determination shall be considered the date of the background check's criminal records check.¶
 - (156) In order to complete a fitness determination, BCU may conduct further research regarding criminal history and abuse history through local jurisdiction courts, Department records, or other resources.¶
 - (167) In order to complete a background check and fitness determination, BCU may require additional information from the SI including but not limited to additional criminal, judicial, other background information, or proof of identity.¶
 - (178) If BCU determines that an SI has additional potentially disqualifying convictions or conditions which have occurred after receiving the background check request, BCU shall provide the SI, if available, the opportunity to disclose any information required in section (5)(d), (5)(e), (5)(f) ~~or (5)(g)~~ of this rule before completion of the final fitness determination.¶
 - (189) BCU may conduct a background check in situations of imminent danger on SIs who have been background checked under these rules and who are currently with the same QE.¶
 - (a) If the Department or Authority determines there is indication of criminal or abusive behavior that could more likely than not pose an immediate risk to vulnerable individuals, BCU shall conduct a new criminal records check on an SI without the completion of a new background check request if allowed by statute or law.¶
 - (b) If BCU determines that a fitness determination based on the new background check would be adverse to the SI, BCU shall provide the SI, if available, the opportunity to disclose any information required in section (5)(d), (5)(e) ~~or (5)(f)~~ of this rule before completion of the final fitness determination.¶
 - (1920) All background checks conducted under this rule shall be documented.
- Statutory/Other Authority: ORS 181A.200, 409.027, 409.050
 Statutes/Other Implemented: ORS 181A.200, ~~409.027~~, ORS 181A.195, 409.010, 418.248, ~~Public Law 115-123~~, 443.004

AMEND: 407-007-0275

RULE SUMMARY: This rule explains the impact of ORS ineligibilities on certain subject individuals for housekeeping purposes, the Department proposes to change "DHS" in the rules to "Department."

CHANGES TO RULE:

407-007-0275

Convictions Under ORS 443.004 Resulting in Ineligibility for Aging and People with Disabilities Program and Developmental Disabilities Program SIs ¶

(1) This rule applies to an SI who:¶

(a) Works with clients receiving services through programs and agencies certified, licensed or otherwise regulated by the Department's Office of Developmental Disabilities (DD) Services.¶

(b) Works with clients of the Department's APD programs and who is:¶

(A) An individual who is paid directly or indirectly with public funds who has or will have contact with recipients of services within:¶

(i) An adult foster home (defined in ORS 443.705); or¶

(ii) A residential facility (defined in ORS 443.400).¶

(B) Any direct care staff secured by any residential care or assisted living facility through the services of a personnel services or staffing agency and the direct care staff works in the facility.¶

(C) A homecare worker as defined in ORS 410.600, a personal support worker as defined in ORS 410.600, a personal care services provider, or an independent provider employed by a Department client who provides care to the client if the Department helps pay for the services.¶

(D) An employee providing care to the Department's APD program clients who works for an in-home care agency as defined by ORS 443.305 which has enrolled to deliver Medicaid funded services as described in OAR 411-033-0000 to 411-033 to 0030 for ~~DHS~~Department clients.¶

(E) An individual in a position specified as being subject in relevant Oregon statutes or Oregon administrative rules.¶

(2) If BCU determines that an individual subject to this rule has a conviction listed in ORS 443.004, BCU shall make the determination of "Ineligible due to ORS 443.004." Under OAR 125-007-0260, this determination is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has. BCU shall provide notice of ineligibility due to ORS 443.004 to the individual.¶

(3) An individual subject to this rule who is an employee and hired prior to July 28, 2009 is exempt from section (2) of this rule provided that the employee remains working for the same employer after July 28, 2009. The SI may transfer or promote to other positions with this same employer and remain exempt from section (2) of this rule. This exemption is not applicable to licensees. In this context:¶

(a) For a homecare worker as defined in ORS 410.600, a personal support worker as defined in ORS 410.600, a personal care services provider, or an independent provider employed by a Department client, the employer of record is the Department unless restricted to one QE or client by a restricted approval under OAR 407-007-0320.¶

(b) For adult foster homes and child foster homes, the SI may change jobs between homes throughout Oregon unless restricted to one QE or home by a restricted approval under OAR 407-007-0320.¶

(c) If the SI works at a QE facility or agency that has a parent company or corporation, the SI may work at any QE facility or agency under the parent company or corporation.¶

(d) For all other SIs, the employer is a QE.¶

(4) If an individual subject to this rule is grandfathered under section (3) of this rule or is not found Ineligible due to ORS 443.004, the individual is subject to a fitness determination under OAR 125-007-0260 and 407-007-0320 for any other potentially disqualifying convictions or conditions in OAR 407-007-0281 and 407-007-0290. The original one or more convictions that led to grandfathering could be used as potentially disqualifying and in a

weighing test only if there was a repetition of behavior shown in criminal history subsequent to the grandfathering convictions.¶¶

(5) A determination of "Ineligible due to ORS 443.004" is not subject to appeal rights under OAR 125-007-0300, 407-007-0330, or 943-007-0501.

Statutory/Other Authority: ORS 181A.195, 409.050

Statutes/Other Implemented: ORS 181A.195, 443.004

AMEND: 407-007-0279

RULE SUMMARY: This rule lists and explains several federal directives insofar as impacting background check conducted under OAR 407-007-0200 to 407-007-0370. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the new background check system, ORCHARDS. The Department is proposing to make the temporary changes permanent, as well as update the rule to clarify current federal 42 USC 1320a-7(a), and add the mandatory exclusions under 42 USC 1935i-3, 42 USC 1396r and 42 CFR 483.12 which can be checked through the new background check system, ORCHARDS.

CHANGES TO RULE:

407-007-0279

Federal Mandatory Exclusions ¶¶

(1) ~~Convictions and conditions~~ Mandatory exclusions under 42 USC 1320a-7(a) (Exclusion of certain individuals and entities from participation in Medicare and State health programs) may result in mandatory exclusion/ineligibility for an SI if the convictions or conditions occurred within five years from the date the final fitness determination meet certain time frames or criteria in 42 USC 1320a-7(c). If the convictions or conditions under 42 USC 1320a-7(a) occurred after five years from the date the final fitness determination no longer meet the criteria in 42 USC 1320a-7(c) and the SI no longer appears on the Office of the Inspector General's (OIG's) List of Excluded Individuals, the SI is subject to a fitness determination under OAR 125-007-0260 and 407-007-0320.¶¶

(a) Section (1) of this rule applies to an SI who is or seeks to be:¶¶

(A) A home care worker or personal support worker as defined in ORS 410.600; or ¶¶

(B) ~~Employed by~~ Works for or seeks to work for:¶¶

(i) A residential facility as defined in ORS 443.400 that receives Medicare or state health care funds; ¶¶

(ii) An in-home care agency as defined in ORS 443.005 that receives Medicare or state health care funds; ¶¶

(iii) A home health agency as defined in ORS 443.005 that receives Medicare or state health care funds; ¶¶

~~(b) If BCU determines that an individual~~ (iv) A nursing facility licensed by the Department in accordance with OAR chapter 411 division 85; ¶¶

(v) An assisted living facility or a residential care facility licensed by the Department in accordance with OAR chapter 411 division 54; ¶¶

(vi) A personnel or staffing agency providing staff to a nursing facility, assisted living facility, or residential care facility licensed by the Department as listed in this subject to this rule and has an exclusion listed in 42 USC 1320a-7; ¶¶

(vii) An adult foster home licensed by the Department or Authority, or licensed locally under the direction of the Department or Authority. ¶¶

(viii) Any other QE determined by the Department or Authority to have a federal requirement for an OIG check. ¶¶

(b) Indication that an individual has an exclusion can be determined by searching the OIG's List of Excluded Individuals. This exclusion list is available to QEDs when initiating and before submitting background check requests through ORCHARDS. ¶¶

(c) If a QED or BCU determines that an individual subject to this rule has an exclusion listed in 42 USC 1320a-7: ¶¶

(A) The QED shall withdraw the background check application before submitting it because the SI is not eligible for the position; or ¶¶

(B) BCU shall make the determination of ineligibility due to mandatory exclusion. ¶¶

(d) Convictions or conditions requiring which are mandatory exclusions under section (1) of this rule include: ¶¶

(A) Convictions related to the delivery of Medicare or State health care program services. ¶¶

(B) Convictions related to the abuse of a client or patient. ¶¶

(C) Felony convictions related to health care fraud. ¶¶

(D) Felony convictions related to the manufacture, delivery, prescription or dispensing of a controlled substance. ¶¶

(e) When checking for a background check application, a QED or BCU can consider an SI has having a mandatory

exclusion if the SI is verified using his or her Social Security Number. Unless the mandatory exclusion has been rescinded under federal directive and the SI is no longer showing on the OIG Exclusion list, an SI remains ineligible for the following periods of time:

(A) The minimum period of exclusion shall be not less than five years from the date of conviction;

(B) If the SI's mandatory exclusion is based on a conviction occurring on or after August 5, 1997 and the SI has on one previous occasion one or more convictions which are also mandatory exclusions, the minimum period of exclusion shall be not less than 10 years from the date of conviction; or

(C) If the SI's mandatory exclusion is based on a conviction occurring on or after August 5, 1997 and the SI has on two or more previous occasions one or more convictions which are also mandatory exclusions, the minimum period of exclusion shall be permanent.

(e) Under OAR 125-007-0260(2)(d), the determination of ineligibility due to mandatory exclusion is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has.

(df) A determination of ineligibility due to mandatory exclusion is subject to appeal rights only if allowed under 42 UCS 1320a-7(e) or 42 USC 1320a-7(d). If allowed, appeals shall comply with OAR 125-007-0300 and 943-007-0501.

(2g).

(2) Mandatory exclusions under 42 USC 1935i-3 (Requirements for, and assuring quality of care in, skilled nursing facilities); 42 USC 1396r (Requirements for nursing facilities); and 42 CFR 483.12 (Freedom from abuse, neglect, and exploitation) may result in ineligibility for an SI if the Department finds certain convictions or conditions in the SI's history.

(a) Section (2) of this rule applies to an SI who works or seeks to work as an employee, volunteer, contractor or intern in any of the following types of QEs:

(A) A nursing facility licensed by the Department in accordance with OAR chapter 411 division 85;

(B) An assisted living facility or a residential care facility licensed by the Department in accordance with OAR chapter 411 division 54;

(C) A personnel or staffing agency providing staff to a nursing facility, assisted living facility, or residential care facility licensed by the Department as listed in this subsection;

(b) If BCU determines that an individual is subject to section (2) of this rule and has an exclusion listed in 42 CFR 483.12, BCU shall make the determination of ineligibility due to mandatory exclusion.

(c) Convictions or conditions listed in 42 CFR 483.12 and requiring mandatory exclusion include:

(A) A finding of guilt regarding abuse, neglect, exploitation, misappropriation of property, or mistreatment by a court of law, as these terms are defined in 42 CFR 483.5 (Definitions);

(B) A finding entered into the State nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of their property as these terms are defined in 42 CFR 483.5 (Definitions); or

(C) A disciplinary action in effect against his or her professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of residents or misappropriation of resident property as these terms are defined in 42 CFR 483.5 (Definitions).

(d) Under OAR 125-007-0260(2)(d), the determination of ineligibility due to mandatory exclusion is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has.

(e) An SI has no appeal rights with BCU under this section. If an SI has the finding or action removed from the local source, the SI may submit a new application if offered a position by a QE covered in this section.

(3) Convictions and conditions under 42 USC 12645g (Criminal history checks under the National and Community Service State Grant Program) result in ~~mandatory exclusion~~ ineligibility for an SI.

(a) Section (2~~3~~) of this rule applies to an SI who ~~is working or volunteering~~ works or seeks to work as an employee, volunteer, or contractor under the National and Community Service Act of 1990 as amended by the Serve America Act, including participants and employees in:

(A) Americorps;

- (B) Foster Grandparents;¶
 - (C) Senior Companions; or¶
 - (D) Any other programs funded under national service laws.¶
- (b) If BCU determines that an individual is subject to this rule and has an exclusion listed in 42 USC 12645g, BCU shall make the determination of ineligibility due to mandatory exclusion. Exclusions include:¶
- (A) Listing on, or requirement to be listed on, a sex offender registry;¶
 - (B) Conviction for murder.¶
 - (C) Refusal to complete the background check.¶
 - (D) False statement by the SI in connection with criminal history disclosure, specifically intentionally providing false information impacting the ability to conduct the background check, such as:¶
 - (i) A false name;¶
 - (ii) A government-issued identification belonging to another person;¶
 - (iii) A false identification; or¶
 - (iv) Fingerprints of another person.¶
- (c) Under OAR 125-007-0260(2)(d), ~~the~~ determination of "ineligibility due to mandatory exclusion" is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of whether the SI has any other potentially disqualifying convictions and conditions.¶
- (d) A determination of "~~mandatory exclusion~~" due to 42 USC 12645g ineligibility due to mandatory exclusion is not subject to appeal rights under OAR 125-007-0300, 407-007-0330, or 943-007-0501.¶
- ~~(34)~~ Prohibitions under 45 USC 9858f (Criminal background checks) under the Child Care and Development Block Grant result in ~~mandatory exclusion~~ ineligibility for an SI. ¶
- (a) Section (3) of this rule applies to child care provider SI under OAR 407-007-0210(102)(a)(K).¶
- (b) If BCU determines that an individual is subject to this rule and has an exclusion listed in 45 USC 9858f, BCU shall make the determination of ineligibility due to mandatory exclusion. Exclusions include:¶
- (A) Refusal to complete the background check;¶
 - (B) Knowingly making a materially false statement in connection with the SI's criminal records check;¶
 - (C) Listing on, or requirement to be listed on, a sex offender registry;¶
 - (D) Felony conviction consisting of:¶
 - (i) Murder;¶
 - (ii) Child abuse or neglect;¶
 - (iii) A crime against children, including child pornography;¶
 - (iv) Spousal abuse;¶
 - (v) Rape or sexual assault;¶
 - (vi) Kidnapping;¶
 - (vii) Arson;¶
 - (viii) Physical assault or battery; or¶
 - (ix) A drug-related offense, if it occurred within five years from the date the final decision; and¶
 - (E) Conviction of a violent misdemeanor as an adult against a child including but not limited to:¶
 - (i) Child abuse;¶
 - (ii) Child endangerment;¶
 - (iii) Sexual assault; or¶
 - (iv) Child pornography.¶
- (c) A fitness determination with a weighing test is not required if the SI has an exclusion listed in this section (with the exception of a drug-related offense within five years from the date the final decision), regardless of any other potentially disqualifying convictions and conditions the SI has. BCU shall make the determination of ineligibility due to mandatory exclusion.¶
- (d) If the SI has only the exclusion of a drug-related offense within five years from the date of the final decision, and no other exclusions listed in this section, BCU shall conduct a weighing test pursuant to OAR 407-007-0300 in making a final decision. If the weighing test determines that the SI is a risk to the well-being of vulnerable

individuals, BCU shall make the determination of mandatory exclusion.¶

(e) Pursuant to OAR 125-007-0260(2)(d), the determination of ineligibility due to mandatory exclusion is considered an incomplete fitness determination. ¶

¶

(f) A determination of ~~mandatory exclusion due to 45 USC 9858f~~ ineligibility due to mandatory exclusion is not subject to appeal rights under OAR 125-007-0300, 407-007-0330, or 943-007-0501. The SI may appeal only to challenge the accuracy or completeness of the criminal records check. ¶

(A) The SI may not hold the position during an appeal. ¶

(B) If the mandatory exclusion is changed at any time during the appeal process, the change does not guarantee placement of the SI, or the SI child care provider. ¶

(C) An SI may represent himself or herself or have legal representation during the appeal process. For the purpose of this rule, the term "SI" shall be considered to include the SI's legal representative. ¶

(D) Any appeal or subsequent request for information must be received by the Department by 11:59 p.m. on the due date, or if mailed, postmarked by 11:59 p.m. on the due date. ¶

(i) To request an appeal, the SI shall complete, sign, and date the Child Care Mandatory Exclusion Appeal Request form and submit it to BCU via mail or fax on or before the due date. ¶

(ii) The due date is 30 calendar days after the effective date of the mandatory exclusion. ¶

(iii) In the event BCU does not receive an appeal by the due date, BCU shall determine, based on a written statement from the SI and available information, if there is good cause to proceed with the appeal. ¶

(E) BCU may conduct additional criminal records checks during the appeal process to update or verify the SI's potentially disqualifying convictions or conditions. If BCU finds new potentially disqualifying convictions and conditions during the appeal resulting in mandatory exclusion, BCU shall amend the notice of fitness determination while still maintaining the original hearing rights and deadlines. ¶

(F) BCU shall provide notice to the SI, indicating its efforts to verify the completeness of the criminal records check and the accuracy of the information challenged by the SI. If BCU determines that the criminal records check was incomplete or inaccurate, BCU shall rectify these issues during the appeal or explain to the SI the issues preventing BCU from making the criminal records check complete or accurate. If the mandatory exclusion is maintained, the SI has no other appeal rights through BCU. ¶

(G) BCU shall ensure the appeal is completed in a timely manner. ¶

(45) Prohibitions under 42 USC 671(a)(20) under the State Plan for Foster Care and Adoption Assistance result in ~~mandatory exclusion~~ ineligibility for an SI. ¶

(a) Section (4) of this rule applies to the following SIs: ¶

(A) An SI who is an employee of a ~~qualified entity~~ QE which is subject to Section 471(a)(20)(D) of the federal 2018 Family First Prevention Services Act and which receives title IV-E funds; and ¶

(B) For child foster homes licensed by the Department's DD programs, or child foster or adoptive homes governed by OAR chapter 413 division 215 and the federal 2006 Adam Walsh Act: ¶

(i) A foster parent or proctor foster parent; ¶

(ii) An adoptive parent applicant or an approved adoptive parent; ¶

(iii) A household member in an adoptive or foster home 18 years of age and over; ¶

(iv) A household member in an adoptive or foster home under 18 years of age if there is reason to believe that the household member may pose a risk to children placed in the home. ¶

(b) If BCU determines that an individual is subject to this rule and has an exclusion listed in 42 USC 671(a)(20)(A), BCU shall make the determination of ineligibility due to mandatory exclusion. Exclusions include: ¶

(A) Felony conviction consisting of: ¶

(i) Child abuse or neglect; ¶

(ii) Spousal abuse; ¶

(iii) A crime against children (including child pornography); ¶

(iv) A crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery; ¶

(B) If, within five years from the date of the ~~background check request~~ final decision, a felony conviction of:¶

(i) Physical assault or battery; or¶

(ii) A drug-related offense.¶

(c) Under OAR 125-007-0260(2)(d), the determination of ineligibility due to mandatory exclusion is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying crimes or conditions the SI has.¶

(d) A determination of ~~mandatory exclusion due to 42 USC 671(a)(20)~~ ineligibility due to mandatory exclusion is not subject to appeal rights under OAR 125-007-0300 or 943-007-0501.

Statutory/Other Authority: ORS 181A.195, 409.050

Statutes/Other Implemented: ORS 181A.195

AMEND: 407-007-0281

RULE SUMMARY: This rule lists all the crime convictions for individuals subject to OAR 407-007-0200 to 407-007-0370. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed to implement 2021 OR chapter 198 and 2021 Measure 110. The Department is proposing to make the temporary changes permanent, as well as update the rule to accurately list currently crimes in Oregon Statutes.

CHANGES TO RULE:

407-007-0281

Potentially Disqualifying Convictions

A conviction of any of the following crimes is potentially disqualifying. ~~However,~~ offenses or convictions that are classified as less than a misdemeanor, such as violations or infractions, are not potentially disqualifying (see ORS 161.505 to 161.565).

(1) Pursuant to OAR 125-007-0270, any conviction of a misdemeanor or felony in any jurisdiction, a U.S. military crime, or an international crime is a permanent review crime for the following:

(a) An SI associated with ~~DH~~Department Child Welfare adoptive and foster homes subject to criminal records checks under OAR 413-120-0400 to 413-120-0475.

(b) An SI who is an employee, contractor or volunteer for a ~~DH~~Department Child Welfare licensed child caring agency governed by OAR chapter 413 division 215.

(c) An SI, as listed in OAR 407-007-0210(912)(a)(H) associated with a child adoptive or foster home licensed by a child caring agency governed by OAR chapter 413 division 215.

(d) An SI, as listed in OAR 407-007-0210(8)12(a)(K), as a child care provider or associated with a child care provider.

(2) For all other SIs subject to these rules:

(a) The crimes listed in this section are permanent review crimes which require that a fitness determination with a weighing test be completed regardless of date of conviction.

~~(A)~~ ORS 163.095, Aggravated m107, Murder I

~~(B)~~ ORS 163.115, Murder II

~~(C)~~ ORS 163.118, Manslaughter I

~~(D)~~ ORS 163.125, Manslaughter II

~~(E)~~ ORS 163.145, Criminally negligent homicide

~~(F)~~ ORS 163.149, Aggravated vehicular homicide

~~(G)~~ ORS 163.165, Assault III

~~(H)~~ ORS 163.175, Assault II

~~(I)~~ ORS 163.185, Assault I

~~(J)~~ ORS 163.187, Strangulation

~~(K)~~ ORS 163.200, Criminal mistreatment II

~~(L)~~ ORS 163.205, Criminal mistreatment I

~~(M)~~ ORS 163.225, Kidnapping II

~~(N)~~ ORS 163.235, Kidnapping I

~~(O)~~ ORS 163.263, Subjecting another person to involuntary servitude in the second degree

~~(P)~~ ORS 163.264, Subjecting another person to involuntary servitude in the first degree

~~(Q)~~ ORS 163.266, Trafficking in persons

~~(R)~~ ORS 163.275, Coercion

~~(S)~~ ORS 163.355, Rape III

~~(T)~~ ORS 163.365, Rape II

~~(U)~~ ORS 163.375, Rape I

~~(V)~~ ORS 163.385, Sodomy III

~~(W)~~ ORS 163.395, Sodomy II

~~(X)~~ ORS 163.405, Sodomy I

(YZ) ORS 163.408, Unlawful sexual penetration II¶
(ZAA) ORS 163.411, Unlawful sexual penetration I¶
(AABB) ORS 163.413, Purchasing sex with a minor, if the courts designate the offense as a sex crime pursuant to ORS 163.413(3)(d), or the offense is the defendant's second or subsequent convictions under ORS 163.413(3)(b)(B)¶
(BBCC) ORS 163.415, Sexual abuse III¶
(CDD) ORS 163.425, Sexual abuse II¶
(DDDE) ORS 163.427, Sexual abuse I¶
(EFFF) ORS 163.432, Online sexual corruption of a child in the second degree, if the offender reasonably believed the child to be more than five years younger than the offender¶
(FFGG) ORS 163.433, Online sexual corruption of a child in the first degree, if the offender reasonably believed the child to be more than five years younger than the offender¶
(GGHH) ORS 163.435, Contributing to the sexual delinquency of a minor¶
(HHII) ORS 163.445, Sexual misconduct, if the offender is at least 18 years of age¶
(IJJ) ORS 163.465, Public indecency¶
(JKK) ORS 163.467, Private indecency¶
(KKLL) ORS 163.525, Incest, with a child victim¶
(LLMM) ORS 163.535, Abandonment of a child¶
(MMNN) ORS 163.537, Buying or selling a person under 18 years of age¶
(NNOO) ORS 163.547, Child neglect I¶
(OOPP) ORS 163.670, Using child in display of sexually explicit conduct¶
(PP-QQ) ORS 163.680, Paying for viewing a child's sexually explicit conduct¶
(QQRR) ORS 163.684, Encouraging child sexual abuse I¶
(RRSS) ORS 163.686, Encouraging child sexual abuse II¶
(SSTT) ORS 163.687, Encouraging child sexual abuse III¶
(TTUU) ORS 163.688, Possession of materials depicting sexually explicit conduct of a child I¶
(UUVV) ORS 163.689, Possession of materials depicting sexually explicit conduct of a child II¶
(VVWW) ORS 163.700, Invasion of personal privacy II¶
(WWXX) ORS 163.701, Invasion of personal privacy I¶
(XXY) ORS 163A.005, All crimes listed in definition of "Sex Crime," including Transporting child pornography into the state ¶
(YYZZ) ORS 164.055, Theft I¶
(ZZAAA) ORS 164.057, Aggravated theft I¶
(AAABBB) ORS 164.098, Organized retail theft¶
(BBBCCC) ORS 164.125, Theft of services¶
(CCCDDD) ORS 164.215, Burglary II¶
(DDDEEE) ORS 164.225, Burglary I¶
(EFFFFFF) ORS 164.325, Arson I¶
(FFFGGG) ORS 164.377, Computer crime¶
(GGGHHH) ORS 164.405, Robbery II¶
(HHHIII) ORS 164.415, Robbery I¶
(IJJJ) ORS 165.013, Forgery I¶
(JJJKKK) ORS 165.022, Criminal possession of a forged instrument I¶
(KKKLLL) ORS 165.032, Criminal possession of a forgery device¶
(LLMMMM) ORS 165.800, Identity theft¶
(MMMNNN) ORS 165.803, Aggravated identity theft¶
(NNNOOO) ORS 167.012, Promoting prostitution¶
(OOOPPP) ORS 167.017, Compelling prostitution¶
(PPPQQQ) ORS 167.057, Luring a minor¶

(~~QQQRRR~~) ORS 167.320, Animal abuse ¶¶

(~~RRRSSS~~) ORS 167.322, Aggravated animal abuse ¶¶

(~~SSSTTT~~) ORS 167.333, Sexual assault of animal ¶¶

(~~TTTTUUU~~) ORS 475.752(1), (2) and (26), Prohibited acts generally (regarding delivery and manufacture drug crimes; formerly ORS 475.840, 2005-2011) ¶¶

(~~UUUVVV~~) ORS 475.806, Unlawful manufacture of hydrocodone ¶¶

(~~VVAVWWW~~) ORS 475.808, Unlawful manufacture of hydrocodone within 1,000 feet of school ¶¶

(~~WWWXXX~~) ORS 475.810, Unlawful delivery of hydrocodone ¶¶

(~~XXXYYY~~) ORS 475.812, Unlawful delivery of hydrocodone within 1,000 feet of school ¶¶

(~~YYYZZZ~~) ORS 475.816, Unlawful manufacture of methadone ¶¶

(~~ZZZAAAA~~) ORS 475.818, Unlawful manufacture of methadone within 1,000 feet of school ¶¶

(~~AAAABBBB~~) ORS 475.820, Unlawful delivery of methadone ¶¶

(~~BBBBCCCC~~) ORS 475.822, Unlawful delivery of methadone within 1,000 feet of school ¶¶

(~~CCCCDDDD~~) ORS 475.826, Unlawful manufacture of oxycodone ¶¶

(~~DDDDEEEE~~) ORS 475.828, Unlawful manufacture of oxycodone within 1,000 feet of school ¶¶

(~~EEEEFFFF~~) ORS 475.830, Unlawful delivery of oxycodone ¶¶

(~~FFFFGGGG~~) ORS 475.832, Unlawful delivery of oxycodone within 1,000 feet of school ¶¶

(~~GGGGHHHH~~) ORS 475.840(1) and (2), Prohibited acts generally (regarding delivery and manufacture drug crimes formerly ORS 475.992; renumbered to ORS 475.752 in 2011) ¶¶

(~~HHHHIIII~~) ORS 475.846, Unlawful manufacture of heroin ¶¶

(~~IIIIJJJJ~~) ORS 475.848, Unlawful manufacture of heroin within 1,000 feet of school ¶¶

(~~JJJJKKKK~~) ORS 475.850, Unlawful delivery of heroin ¶¶

(~~KKKKLLLL~~) ORS 475.852, Unlawful delivery of heroin within 1,000 feet of school ¶¶

(~~LLLLMMMM~~) ORS 475.866, Unlawful manufacture of 3,4-methylenedioxymethamphetamine ¶¶

(~~MMMMNNNN~~) ORS 475.868, Unlawful manufacture of 3,4-methylenedioxymethamphetamine within 1,000 feet of school ¶¶

(~~NNNNOOOO~~) ORS 475.870, Unlawful delivery of 3,4-methylenedioxymethamphetamine ¶¶

(~~OOOOPPPP~~) ORS 475.872, Unlawful delivery of 3,4-methylenedioxymethamphetamine within 1,000 feet of school ¶¶

(~~PPPPQQQQ~~) ORS 475.876, Unlawful manufacture of cocaine ¶¶

(~~QQQQRRRR~~) ORS 475.878, Unlawful manufacture of cocaine within 1,000 feet of school ¶¶

(~~RRRRSSSS~~) ORS 475.880, Unlawful delivery of cocaine ¶¶

(~~SSSSTTTT~~) ORS 475.882, Unlawful delivery of cocaine within 1,000 feet of school ¶¶

(~~TTTTUUUU~~) ORS 475.886, Unlawful manufacture of methamphetamine ¶¶

(~~UUUUVVVV~~) ORS 475.888, Unlawful manufacture of methamphetamine within 1,000 feet of school ¶¶

(~~VVAVWWW~~) ORS 475.890, Unlawful delivery of methamphetamine ¶¶

(~~WWWWWXXX~~) ORS 475.892, Unlawful delivery of methamphetamine within 1,000 feet of school ¶¶

(~~XXXXYYYY~~) ORS 475.904, Unlawful delivery of controlled substance within 1,000 feet of school ¶¶

(~~YYYYZZZZ~~) ORS 475.906, Penalties for distribution to minors ¶¶

(~~ZZZZAAAAA~~) ORS 475.908, Causing another person to ingest a controlled substance ¶¶

(~~AAAABBBBB~~) ORS 475.910, Application of controlled substance to the body of another person ¶¶

(~~BBBBCCCCC~~) ORS 475.914, Prohibited acts for registrants (with the Oregon State Board of Pharmacy) ¶¶

(~~CCCCDDDDD~~) Any crime of attempt, solicitation, or conspiracy to commit a crime listed in this section pursuant to ORS 161.405, 161.435, or 161.450 ¶¶

(~~DDDDDEEEEE~~) Any crime in any other jurisdiction that is the substantial equivalent of any of the Oregon crimes listed in section (2)(a) of this rule, as determined by BCU. This includes any U.S. military crimes which are the substantial equivalent of crimes listed in section (2)(a) of this rule. ¶¶

(b) The crimes listed in this section are ten-year review crimes which require that a fitness determination with a weighing test be completed if the date of conviction is within ten years of the background check submission. ¶¶

(A) Any misdemeanor or felony not listed in section 2(a) or (2)(c) of this rule in Oregon or any other jurisdiction. This includes U.S. military crimes not considered to be the substantial equivalent of crimes listed in section (2)(a) of this rule.¶

(B) Any crime of attempt, solicitation, or conspiracy to commit a crime ~~listed in section (2)(b)~~ pursuant to ORS 161.405 or 161.435, or 161.450: included in section (2)(b).¶

(c) Two or more convictions of ORS 813.010, (Driving under the Influence of Intoxicants (DUI)) or 830.325 (Operating Boat while under Influence of Intoxicants) or a misdemeanor conviction under a law in any jurisdiction that imposes criminal penalties for operating a vehicle or boat while under the influences of intoxicants, are potentially disqualifying if they have occurred within five years of the date of the ~~background check submission.~~ criminal records check.¶

(A) A single conviction of ~~ORS 813.010~~ a crime in section (2)(c) is not considered potentially disqualifying regardless of the date of conviction.¶

(B) If an SI has two or more convictions of ~~ORS 813.010~~ a crime in section (2)(c) and only one, or none, occurred within five years from the date of the background check submission, the convictions are not potentially disqualifying. ¶

(3) Evaluations of crimes may be based on available information in Oregon laws and laws in other jurisdictions regarding the crime.¶

(4) Under no circumstances may a crime be considered potentially disqualifying if it is:¶

(a) Related to marijuana ~~and~~ if the crime is no longer a criminal offense in the originating jurisdiction.¶

(b) Part of a juvenile record that has been expunged pursuant to ORS 419A.260 to 419A.262.¶

(c) Part of an adult record that has been set aside pursuant to ORS 137.225.

Statutory/Other Authority: ORS 181A.195, ORS 409.050

Statutes/Other Implemented: ORS 181A.195, 2021 OR Law Ch. 198, 2021 OR Measure 110

AMEND: 407-007-0290

RULE SUMMARY: This rule outlines the the potentially disqualifying conditions that individuals subject to OAR 407-007-0200 to 407-007-0370 have that would lead to the need for a weighing test (see OAR 407-007-0300). This rule was updated with a temporary filing, effective 6/25/2021 with changes needed to match current Oregon statutes and rules. The Department is proposing to make the temporary changes permanent.

CHANGES TO RULE:

407-007-0290

Potentially Disqualifying Conditions ¶¶

Pursuant to OAR 125-007-0270, the following are potentially disqualifying conditions, if they exist on the date of the final fitness determination unless otherwise noted:-¶¶

(1) False statement is potentially disqualifying when all the following conditions are met:-¶¶

(a) In a background check request, an SI has submitted the answer, "No" to the question regarding whether the SI has criminal history;-¶¶

(b) The Department finds potentially disqualifying criminal history in the criminal records check; and-¶¶

(c) The found potentially disqualifying criminal history occurred before the date of the SI's submission of the criminal records check request.-¶¶

(2) The SI is a registered sex offender in any jurisdiction. There is a rebuttable presumption that an SI is likely to engage in conduct that would pose a significant risk to vulnerable individuals if the SI has been designated as a level three sex offender under ORS 163A.100(3), a predatory sex offender prior to January 1, 2014, or found to be a sexually violent dangerous offender under ORS 144.635 (or similar designations in other jurisdictions).-¶¶

(3) The SI has an outstanding warrant for any permanent review crime in any jurisdiction.-¶¶

(4) The SI has a deferred sentence, conditional discharge, or is participating in a diversion program for a permanent review crime in any jurisdiction.-¶¶

(5) The SI is currently on probation, parole, or post-prison supervision for a potentially disqualifying crime in any jurisdiction.-¶¶

(6) The SI has been found in violation of post-prison supervision, parole, or probation for a potentially disqualifying crime or condition in any jurisdiction within five years from the date of the background check submission final fitness determination.-¶¶

(7) The SI has an unresolved arrest, charge, or a pending indictment for a permanent review crime in any jurisdiction.-¶¶

(8) The SI has been arrested in any jurisdiction as a fugitive from another state or a fugitive from justice for a permanent review crime that results in a potentially disqualifying conviction or condition.-¶¶

(9) The SI has an adjudication in a juvenile court in any jurisdiction, finding that the SI was responsible for a permanent review crime that would result in a conviction if committed by an adult. Subsequent adverse rulings from a juvenile court, such as probation violations, shall also be considered potentially disqualifying if within five years from the date of the final fitness determination.-¶¶

(10) The SI has a finding of "guilty except for insanity," "guilty except by reason of insanity," "not guilty by reason of insanity," "responsible except for insanity," "not responsible by reason of mental disease or defect," or similarly worded disposition in any jurisdiction regarding a permanent review crime, unless the local statutes indicate that such an outcome is considered an acquittal.-¶¶

(11) The SI has potentially disqualifying abuse as determined from abuse investigation reports which have an outcome of founded or substantiated, and in which the SI is determined to have been responsible for the abuse. For the following SIs, potentially disqualifying abuse includes:-¶¶

(a) For an SI subject to 45 USC 9858f (Criminal background checks) under the Child Care and Development Block Grant; 42 USC 671(a)(20) under the State Plan for Foster Care and Adoption Assistance (the Adam Walsh Act of 2006) or is an employee of a QE subject to Section 471(a)(20)(D) of the federal 2018 Family First Prevention Services Act and which receives title IV-E funds:-¶¶

- (A) Child protective services history held or received by the Department or OTIS regardless of the date of the initial report;¶
- (B) Child protective services history from any state or jurisdiction reviewed pursuant to the federal requirements, and determined by BCU to be potentially disqualifying; and¶
- (C) Adult protective services investigations of neglect, physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by OTIS and APD programs based on severity.¶
- (b) For an SI on the background check registry maintained under OAR 407-007-0600 to 407-007-0640; licensed, certified, or otherwise regulated by the Department; associated with any QE licensed, certified, or otherwise regulated by the Department (any QE licensed, certified, or regulated only with the Authority and not the Department are not included):-¶
- (A) Child protective services history held or received by the Department or OTIS regardless of the date of the initial report; and¶
- (B) Adult protective services investigations of neglect, physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by the ~~OAAPI~~OTIS and APD programs based on severity.¶
- (c) For any other SI with direct contact with children:-¶
- (A) Child protective services history held or received by the Department or OTIS regardless of the date of the initial report; and¶
- (B) Adult protective services investigations of neglect, physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by the ~~OAAPI~~OTIS and APD programs based on severity.¶
- (d) For all other SIs, adult protective services investigations of neglect, physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to the BCU by ~~OAAPI~~OTIS and APD programs based on severity.¶
- (12) For an SI who is a proctor foster parent, the SI has any restraining order or protective order against the SI.¶
- (13) For an SI who is SI who is a proctor foster parent, the SI makes a false statement to the QE or Department, including the provision of materially false information, regarding abuse, restraining orders, or protective orders; or failure to disclose information regarding abuse, restraining orders, or protective orders. Nondisclosure of unsubstantiated or inconclusive abuse or dismissed restraining orders or protective orders, may not be considered a false statement.

Statutory/Other Authority: ORS 181A.200, 409.027, 409.050

Statutes/Other Implemented: ORS 181A.200, 409.027, ORS 181A.195, 409.010, 443.004, 418.248

AMEND: 407-007-0300

RULE SUMMARY: This rule shows several of the factors the Department must consider if an individual subject to OAR 407-007-0200 to 407-007-0370 has any potentially disqualifying convictions or conditions (see OAR 407-007-0281 and 407-007-0290). This rule was updated with a temporary filing, effective 6/25/2021 with changes to implement 2021 OR Law Ch. 198 and 2021 OR Measure 110. The Department is proposing to make the temporary changes permanent.

CHANGES TO RULE:

407-007-0300

Weighing Test ¶

If an SI has potentially disqualifying convictions under OAR 407-007-0281, or potentially disqualifying conditions under OAR 407-007-0290, BCU shall conduct a weighing test. The weighing test shall include consideration of factors pursuant to ORS 181A.195 and the following if available to the BCU at the time of the weighing test.¶

(1) Circumstances regarding the nature of potentially disqualifying convictions and conditions including but not limited to:¶

- (a) The details of incidents leading to the potentially disqualifying convictions or conditions.¶
- (b) Age, maturity and mental capacity of the SI at time of the potentially disqualifying convictions or conditions.¶
- (c) Facts that support the potentially disqualifying convictions or conditions.¶
- (d) Passage of time since commission of the potentially disqualifying convictions or conditions.¶
- (e) Consideration of state or federal laws, regulations, or rules covering the position, facility, employer, or QE regarding the potentially disqualifying convictions or conditions.¶

(f) Consideration of state or federal laws, regulations, or rules that impact what is considered potentially disqualifying. For example:¶

(A) Effective February 1, 2021, most possession crimes in Oregon were reduced to violations, making them no longer potentially disqualifying.¶

(B) The Department may give less weight to a potentially disqualifying conviction or condition which is only potentially disqualifying because it was a crime at the time it occurred but at the time of the weighing test is no longer considered a crime nor is associated with any potentially disqualifying conviction or condition.¶

(C) The consideration given potentially disqualifying convictions or conditions impacted by federal laws, regulations, or rules is determined by the number of these potentially disqualifying convictions or conditions and evaluation of relevant factors in sections (1), (2) and (3) of this rule.¶

(2) If applicable, circumstances regarding the nature of potentially disqualifying abuse including but not limited to:¶

- (a) The nature and type of abuse; and¶
- (b) Other information gathered during the scope of the abuse investigation.¶
- (c) The date of the abuse incident and abuse investigation.¶
- (d) The quality of the abuse investigation including, if applicable, any exhibits and related documents with consideration taken into account regarding completeness, objectivity, and sufficiency.¶
- (e) Due process or lack thereof provided to the SI after the abuse investigation.¶
- (f) Required conditions and actions resulting from the founded or substantiated abuse that would allow for reinstatement of the SI in the position including but not limited to training, counseling, corrective or disciplinary action, and the SI's compliance.¶

(3) Other factors when available including but not limited to:¶

- (a) Periods of incarceration, including rehabilitation or other impacts on SI.¶
- (b) Status of and compliance with parole, post-prison supervision, or probation regarding potentially disqualifying convictions or conditions.¶
- (c) Evidence of alcohol or drug issues directly related to potentially disqualifying convictions or conditions.¶
- (d) Evidence of other treatment or rehabilitation related to potentially disqualifying convictions or conditions.¶
- (e) Likelihood of repetition of behaviors leading to potentially disqualifying convictions or conditions.¶

(f) Other information related to criminal activity including charges, arrests, pending indictments, and convictions. Other behavior involving contact with law enforcement may also be reviewed if information is relevant to other criminal records or shows a pattern relevant to criminal history. Consideration of these activities and behaviors are only allowed for SIs listed in OAR 407-007-0281(1).¶

~~(g) If a ten-year review conviction or a condition is related to driving any vehicle or conveyance while under the influence of intoxicants in any jurisdiction, consideration shall be given that, for an SI subject to OAR 407-007-0281(2)(c), two or more convictions of ORS 813.010 are needed within five years of the background check to be considered potentially disqualifying. If the ten-year review conviction or the condition have similar circumstances to ORS 813.010, then less weight may be given to the convictions or conditions.¶~~

~~(h) Changes in circumstances subsequent to the potentially disqualifying convictions or conditions including but not limited to:¶~~

~~(A) History of high school, college, or other education related accomplishments.¶~~

~~(B) Work history (employee or volunteer).¶~~

~~(C) History regarding licensure, certification, or training for licensure or certification.¶~~

~~(D) Written recommendations from current or past employers, including Department client employers.¶~~

~~(i) Indication of the SI's cooperation, honesty during the background check process, including:¶~~

~~(A) Acknowledgment and acceptance of responsibility of potentially disqualifying convictions and conditions; or ¶~~

~~(B) Providing false, incomplete or misleading information regarding potentially disqualifying convictions and conditions, or any subsequent circumstances.¶~~

(4) BCU shall consider the relevancy of the SI's potentially disqualifying convictions or conditions to the paid or volunteer position, or to the environment in which the SI will reside, work, or visit.

Statutory/Other Authority: ORS 181A.200, 409.027, 409.050, 443.008

Statutes/Other Implemented: ORS 181A.200, 409.027, ORS 181A.195, 409.010, 443.004, 2021 OR Law Ch. 198, 2021 OR Measure 110

AMEND: 407-007-0315

RULE SUMMARY: This rule provides specifics on the background check process between submission of the background check application and the final fitness determination or outcome, explaining hiring on a preliminary basis and when and how it can be done. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the new background check system, ORCHARDS. The Department is proposing to make the temporary changes permanent, as well as more recent changes to match current processing in ORCHARDS.

CHANGES TO RULE:

407-007-0315

Hired on a Preliminary Basis ¶

(1) A preliminary fitness determination is required to determine if an SI may participate in training or orientation, work, volunteer, or otherwise perform in the position listed on the background check request prior to a final fitness determination. An SI may not be hired on a preliminary basis prior to the completion of a preliminary fitness determination. ¶

(2) An SI may be hired on a preliminary basis only ~~if:~~ ¶

~~(a) During the period of time prior to a final fitness determination and into:~~ ¶

~~(b) For the position listed on the background check request. ¶~~

~~(3) The SI; and ¶~~

~~(c) If not prohibited by section (4) of this rule. ¶~~

~~(3) To be hired on a preliminary basis, an SI and QED must provide minimum information required for a background check request and the QED must review the information. ¶~~

~~(4) The QED shall make ones indicated in OAR 407-007-0250(1) and 407-007-0250(6). ¶~~

~~(4) The QE may not hire a SI on a preliminary basis under any of the following determination circumstances: ¶~~

~~(a) If the SI makes no disclosure of criminal history, the QE may hire the SI on a preliminary basis in accordance with relevant program rules, QE policy in a preliminary basis or probationary status is not allowed under program rules, Oregon statutes, or federal directives. ¶~~

~~(b) If the SI discloses any criminal history and all of the history occurred outside the five year period from the date the SI manually or electronically signed the background check request, the QED may hire the SI on a preliminary basis in accordance with relevant program rules, QE policies, Oregon statutes, or federal directives. ¶~~

~~(c) If the SI indicates any criminal history occurring within the five year period from the date the SI manually or electronically signed the background check request: ¶~~

~~(A) The QED may allow the SI to be hired on a preliminary basis if the disclosed criminal history has (5) of this rule, resulting in the QE being allowed to hire the SI on a preliminary basis. ¶~~

~~(c) The QE or BCU determines that: ¶~~

~~(A) More likely than not, the SI poses a potential threat to vulnerable individuals, based on a preliminary fitness determination and weighing test: ¶~~

~~(B) The SI's most recent background check under these rules or other Department or Authority criminal records check rules or abuse check rules resulted in a denial; or ¶~~

~~(C) The QED may not allow the SI to be hired on a preliminary basis if the disclosed criminal history has an outcome of "pending outcome," "diversion or conditional discharge," "convicted," "on probation," "juvenile adjudication," "unknown," or other outcome that BCU determines is adverse. ¶~~

~~(5) The QED shall submit the background check request to BCU immediately upon verification of the SI's identity, the SI's completion of rules; or ¶~~

~~(D) BCU has reason to believe hiring on a preliminary basis is not appropriate based on circumstances or ¶~~

~~compliance with the background check request, and process of the QED's completion of the preliminary fitness determination. SI, QED, or QE.~~

~~(d) An outcome of not hiring on a preliminary basis may only be overturned by the BCU.~~

~~(65) If requested by the QED, BCU may review a newly submitted background check request when the SI's disclosed criminal history prevents hiring on a preliminary basis has not been allowed. For example:~~

~~(a) BCU may review the background check request for disclosed criminal history that caused BCU's background check online system to not allow hiring on a preliminary basis. If BCU does not find any potentially disqualifying convictions or conditions in the SI's disclosures and, BCU shall update the SI's status accordingly; or, The QE may hire the SI on a preliminary basis if nothing in section (4) of this rule applies.~~

~~(b) If the SI has disclosed potentially disqualifying convictions or conditions, BCU may conduct a preliminary fitness determination pursuant to OAR 125-007-0250 with a weighing test.~~

~~(7) The QE may not hire a SI on a preliminary basis under any of the following circumstances:~~

~~(a) Being hired on a preliminary basis or probationary status is not allowed under program rules, Oregon statutes, or federal directives.~~

~~(b) The SI has disclosed criminal history occurring within the past five years that has an outcome of "pending outcome," "diversion or conditional discharge," "convicted," "on probation," "juvenile adjudication," "unknown" or other outcome BCU determines to be adverse and the QE has not requested a review by BCU as indicated in section (6) of this rule resulting in the QE being allowed to hire the SI on a preliminary basis.~~

~~(c) The QE or BCU determines that:~~

~~(A) More likely than not, the SI poses a potential threat to vulnerable individuals, based on a preliminary fitness determination and weighing test;~~

~~(B) The SI's most recent background check under these rules or other Department or Authority criminal records check rules or abuse check rules resulted in a denial; or~~

~~(C) The SI is currently involved in contesting a background check under these or other Department or Authority criminal records check rules or abuse check rules; or~~

~~(D) If BCU makes a positive decision in the preliminary fitness determination, BCU shall update the SI's status accordingly and the QE may hire the SI on a preliminary basis if nothing in section (4) of this rule applies. If BCU makes a negative decision, BCU shall reason to believe hiring on a preliminary basis is not appropriate based on circumstances or compliance with the background check process of the SI, QED, or QE.~~

~~(d) An outcome of no hiring on a preliminary basis may only be overturned by the BCU. voke hiring of the SI on a preliminary basis.~~

~~(86) An SI hired on a preliminary basis shall be actively supervised at all times unless sections (97) or (108) of this rule apply.~~

~~(a) The individual providing active supervision at all times shall do the following:~~

~~(A) Be in the same building as the SI or, if outdoors of QE buildings or any location off the QE property, be within line-of-sight and -of-hearing, except as provided in section (86)(b)(B) of this rule;~~

~~(B) Know where the SI is and what the SI is doing; and~~

~~(C) Periodically observe the actions of the SI.~~

~~(b) The individual providing the active supervision may be either:~~

~~(A) An SI who has been approved without restrictions pursuant to these rules or previous Department or Authority criminal records check rules; or~~

~~(B) The adult client, an adult client's adult relation, the client's legal representative, or a child's parent or guardian. Active supervision by these individuals is appropriate in situations where care is given directly to clients usually in a home such as but not limited to in-home care, home health, or care by home care workers, personal care assistants, or child care providers.~~

~~(i) The adult client may actively supervise a homecare worker, personal care services provider, independent provider, or an employee of an in-home care agency or home health agency if the client makes an informed decision to employ the provider. Someone related to the client may also provide active supervision if the relative has been approved by the Department, the Authority, the QED, or the private-pay client receiving services~~

through an in-home care or home health agency.-¶

(ii) A child client's parent or guardian shall be responsible for providing active supervision in the case of child care providers. The supervision is not required to be performed by someone in the same building as the child.-¶

~~(97)~~ An SI allowed to work on a preliminary basis is exempt from active supervision if SI is working under an approved background check and is currently going through a recheck required by program rules or OAR 407-007-0600 to 407-007-0640 unless there is evidence of potentially disqualifying convictions or conditions ~~within~~since the previous ~~24 months~~background check. If BCU finds evidence of criminal activity or potentially disqualifying abuse ~~within~~since the previous ~~24 months~~background check, BCU may revoke working on a preliminary basis.-¶

~~(108)~~ An SI approved without restrictions within the previous 24 months through a documented criminal records check or abuse check pursuant to these rules or prior Department or Authority criminal records check rules or abuse check rules may be hired on a preliminary basis without active supervision. Twenty-four months is calculated from date of previous approval to the date of hire in the new position. Exemption from active supervision is not allowed in any of the following situations:-¶

(a) If the SI cannot provide documented proof that he or she worked continuously under the previous approval for at least one year.-¶

(b) If there is evidence of potentially disqualifying convictions or conditions within the previous 24 months.-¶

(c) If, as determined by the QE or BCU, 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.-¶

~~(119)~~ Revocation of hired on a preliminary basis is not subject to hearing or appeal. The QE or BCU may immediately revoke hired on a preliminary basis for either of the following reasons:-¶

(a) There is any indication of falsification of the background check application.-¶

(b) The QE or BCU determines that allowing the SI to be hired on a preliminary basis is not appropriate, based on the application, criminal record, position duties, preliminary fitness determination by the Department, or Department program rules.-¶

~~(120)~~ Nothing in this rule is intended to require that an SI who is eligible to be hired on a preliminary basis be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request prior to a final fitness determination.-¶

~~(131)~~ Preliminary fitness determinations must be documented in writing, including any details regarding a weighing test, if required.

Statutory/Other Authority: ORS 181A.200, ORS 409.027, 409.050

Statutes/Other Implemented: ORS 181A.200, ORS 409.027, ORS 181A.195, 409.010, 443.004

AMEND: 407-007-0318

RULE SUMMARY: This rule provides specific guidelines for background checks for individuals subject to the federal 2018 Family First Prevention Services Act and receives title IV-E funds. The department proposed to change "DHS" to "Department."

CHANGES TO RULE:

407-007-0318

Approval for Family First Subject Individuals

(1) Approval in this rule applies to the background check process for certain employees of a child caring agency which is subject to the federal 2018 Family First Prevention Services Act and receives title IV-E funds. Specifically, this rule applies to an SI who:¶¶

(a) Is an employee of a child caring agency licensed by DHDepartment Child Welfare, OAR 413-215-0001 to 413-215-1031;¶¶

(b) Resided outside of Oregon for 60 or more consecutive days during the previous five years requiring a check of child abuse and neglect registries from states other than Oregon.¶¶

(2) An SI is eligible for an Approval if all the following conditions are met:¶¶

(a) The QED has submitted the background check to BCU.¶¶

(b) The SI has submitted fingerprint capture and the fingerprint criminal records check has been completed and the results have been returned to BCU;¶¶

(c) Requested documentation required for the out of state child abuse check has been completed by the SI and BCU, and BCU has submitted the documentation to the state for the abuse check; and¶¶

(d) Based on all the information currently available to BCU on the SI's Oregon and national criminal records check and Oregon adult and child abuse checks, the final fitness determination appears to be "approved" in accordance with OAR 407-007-0320.¶¶

(3) Should BCU at any time after an Approval receive a negative finding response from a request to another state made in section (2) of this rule, BCU shall either:¶¶

(a) Rescind the Approval and continue with the background check process which may include gathering further information and conducting a weighing test pursuant to OAR 407-007-0300.¶¶

(b) Notify the QE that a new background check is required.

Statutory/Other Authority: ORS 181A.200, 409.027, 409.050

Statutes/Other Implemented: ORS 181A.200, 181A.195, 409.027, 409.010

AMEND: 407-007-0330

RULE SUMMARY: This rule provides guidance to individuals subject to OAR 407-007-0200 to 407-007-0370 receiving an adverse fitness determination who wish to contest the outcome. This rule was updated with a temporary filing, effective 6/25/2021 with language to confirm that all final orders are subject to judicial review under OAR 183.482. The Department is proposing to make the temporary changes permanent.

CHANGES TO RULE:

407-007-0330

Contesting a Fitness Determination ¶¶

- (1) An SI may contest an adverse fitness determination pursuant to OAR 407-007-0320. In this rule, an adverse fitness determination includes: ¶¶
- (a) A final fitness determination of denied or approved with restrictions pursuant to OAR 407-007-0320; or ¶¶
 - (b) A mandatory exclusion pursuant to federal law and OAR 407-007-0279 if hearing rights are allowed by federal law. ¶¶
- (2) The appeal process is conducted in accordance with OAR 125-007-0300, ORS 183.411 to 183.497, and the Attorney General's Uniform and Model Rules of Procedure for the Office of Administrative Hearings (OAH), OAR 137-003-0501 to 137-003-0700. ¶¶
- (3) During the appeal process, the final fitness determination remains in effect. ¶¶
- (a) If an SI is denied or mandatorily excluded, the SI may not hold the position, provide services or be employed, licensed, certified, or registered, or otherwise perform in positions covered by these rules. ¶¶
 - (b) If an SI has an approval with restrictions, the SI may only work under the terms of the restriction listed on the notice of final fitness determination. ¶¶
- (4) A positive change does not guarantee employment or placement. A positive change is either: ¶¶
- (a) A denial changing to an approval or an approval with restrictions; or ¶¶
 - (b) An approval with restrictions changing to an approval. ¶¶
- (5) An SI may represent himself or herself or have legal representation during the appeal process. For the purpose of this rule, the term "SI" shall be considered to include the SI's legal representative if the SI has provided the Department with such information. ¶¶
- (a) An SI who is appealing an adverse outcome regarding the position of homecare worker as defined in ORS 410.600 or personal support worker as defined in ORS 410.600 may be represented by a labor union representative pursuant to ORS 183.459. ¶¶
 - (b) If the SI is a member of a bargaining unit, the SI may be represented by the certified or recognized exclusive representative of the bargaining unit. ¶¶
 - (c) For all other SIs, the SI's legal representative may be an Oregon licensed attorney. ¶¶
 - (6) A hearing representative may represent BCU in contested case hearings. Alternatively, BCU may be represented by the Office of the Attorney General. ¶¶
- (7) Any contested case hearing request must be received by the Department by 11:59 p.m. on the due date, or if mailed, postmarked by 11:59 p.m. on the due date. ¶¶
- (a) To request a contested case hearing, the SI shall complete, sign and date the Hearing Request form. ¶¶
 - (b) The completed, signed, and dated form must be received by the Department on or before the due date. The due date is 30 calendar days after the effective date of action on the notice of fitness determination. ¶¶
 - (c) If a contested case hearing request is not timely, BCU shall determine, based on a written statement from the SI and available information, if there is good cause to proceed with the appeal process. ¶¶
 - (d) BCU may refer an untimely request to OAH for a contested case hearing solely on the issue of the timeliness of the contested case hearing request. ¶¶
- (8) After BCU receives the SI's request for a contested case hearing, BCU may conduct an administrative review before referring the appeal to OAH. ¶¶
- (a) The administrative review is not open to the public. ¶¶

- (b) The SI must participate in the administrative review. ¶
- (c) In addition to any other method of communication, the Department shall provide the SI with written correspondence that initiates the administrative review process ("Correspondence"). ¶
- (d) The Correspondence shall include a due date for the SI. Any response to the Department's Correspondence must be received by the Department by 11:59 p.m. on the due date, or if mailed, postmarked by 11:59 p.m. on the due date. ¶
- (e) Participation by the SI may include but is not limited to providing additional information or additional documents requested on or before the due date specified in the Department's Correspondence. ¶
- (f) For the purposes of this rule, failure to participate in the administrative review means that the SI does not respond in any way to the Department's Correspondence by the specified due date. Failure to participate in the administrative review process shall result in a dismissal order pursuant to paragraph (11)(b)(C) of this rule. ¶
- (g) The outcome of an administrative review is a new fitness determination. ¶
- (A) If the hearing representative makes a positive change to approved, BCU shall issue a final order and an amended notice to the SI and the QE. ¶
- (B) If the hearing representative makes a positive change from denial to approval with restrictions, BCU shall issue an amended notice to the SI and the QE. If the SI does not continue with to a contested case hearing, BCU shall issue a final order as an amended notice of fitness determination to the SI and the QE. ¶
- (C) If the hearing representative maintains the outcome of the final fitness determination, or changes an approval with restrictions to a denial, BCU will refer the contested case hearing request to OAH. ¶
- (9) The SI may not challenge a finding of substantiated abuse or criminal conviction that was a basis for the adverse outcome under this rule. The SI has the right to contest the weight the Department has given to: ¶
 - (a) The evidence; ¶
 - (b) The factors used in the weighing test; or ¶
 - (c) Any other information used in making the fitness determination. ¶
- (10) BCU may conduct additional research, including abuse checks or criminal records checks (if allowed by law) during the appeal process to update or verify the SI's potentially disqualifying convictions or conditions and factors to consider in the weighing test. If needed, BCU shall amend the notice of fitness determination while still maintaining the original hearing rights and deadlines. ¶
- (11) An administrative law judge from OAH conducts the contested case hearing. ¶
 - (a) The contested case hearing is not open to the public. ¶
 - (b) The Department shall provide the administrative law judge and the SI a complete copy of available information used during the criminal records checks and fitness determinations. The SI is entitled to reasonable notice of all hearing documents through proper service. ¶
 - (c) An SI may not have access to confidential information contained in records collected or developed during the criminal records check process without a protective order limiting further disclosure of the information. ¶
 - (A) The Department must request a protective order by motion to an administrative law judge as provided for in OAR 137-003-0568(5) or to a court of law. ¶
 - (B) In conjunction with a protective order issued pursuant to this section, individually identifying information relating to clients, witnesses, and other persons identified in abuse investigation reports or other records collected or developed during the criminal records check process shall be redacted prior to disclosure, except for the information identifying the SI. ¶
 - (d) The administrative law judge shall make a new final fitness determination based on evidence and the contested case hearing record. ¶
 - (e) The only remedy an administrative law judge may grant is a final fitness determination that the SI is approved, approved with restrictions, denied, or mandatorily excluded pursuant to OAR 407-007-0279(1). ¶
 - (f) Under no circumstances shall the Department or the QE be required to place an SI in any position, nor shall the Department or the QE be required to accept services or enter into a contractual agreement with an SI. ¶
- (12) The result of an appeal is a final order. ¶
 - (a) In the following situations, the notice of final fitness determination becomes the final order by default as if the

SI never requested a hearing.-¶

(A) The SI failed to request a contested case hearing in the time allotted in this rule. No other document will be issued after the notice of final fitness determination.-¶

(B) The SI withdraws the request for contested case hearing at any time during the appeal process.-¶

(b) The Department shall issue an order dismissing the appeal (a "dismissal order") in the following circumstances:
¶

(A) The Department shall dismiss a contested case hearing request if the administrative review results in a positive outcome. The only exception to the Department issuing a dismissal order is when the SI proceeds to contested case hearing because the administrative review changed fitness determination from denial to approval with restrictions.-¶

(B) The SI may withdraw a hearing request verbally or in writing at any time before the issuance of a final order. A dismissal order due to the withdrawal is effective the date the withdrawal is received by the Department or OAH. The SI may cancel the withdrawal in writing within 14 calendar days after the date of withdrawal.-¶

(C) The Department shall dismiss a hearing request when the SI fails to participate in the administrative review. Failure to participate as defined in (8)(f) of this rule shall result in termination of hearing rights through a dismissal order.-¶

(i) The dismissal order is effective on the date the Department mails the dismissal order. ¶

(ii) The Department shall review a good cause request from the SI to reinstate hearing rights if received in writing by the Department within 14 calendar days from the date of the dismissal order.-¶

(c) After a contested case 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 becomes the final order.-¶

(B) If timely written exceptions to the proposed and final order are received by the Department, the Department's Director or designee shall consider the exceptions and serve a final order, or request a written response or a revised proposed and final order from the administrative law judge.-¶

(13) Final orders, including dismissal and default orders, are subject to reconsideration or rehearing petitions within 60 calendar days after the order is served, pursuant to OAR 137-003-0675. ~~Final orders are appealable pursuant to ORS 183.482.-¶~~

(14) All contested case hearing decisions are subject to judicial review under ORS 183.482 in the Court of Appeals.
¶

(145) BCU may provide the QED with the results of the appeal.

Statutory/Other Authority: ORS 181A.200, 183.459, 409.027, 409.050, 443.008, 181A.215

Statutes/Other Implemented: ORS 181A.200, 183.459, 409.027, ORS 181A.195, 409.010, 443.004, 443.008;
~~181A.215~~

AMEND: 407-007-0600

RULE SUMMARY: This rule provides the purpose and scope of OAR 407-007-0600 to 407-007-0640. This rule was updated with a temporary filing, effective 6/25/2021 with housekeeping changes, making "Background Check Registry" lowercase. The Department is proposing to make the temporary changes permanent.

CHANGES TO RULE:

407-007-0600

Purpose ¶¶

(1) The purpose of these rules, OAR 407-007-0600 to 407-007-0640, is to provide for procedures and standards for the ~~B~~background ~~C~~check ~~R~~registry pursuant to ORS 443.006.¶¶

(2) These rules apply to subject individuals (SIs), as defined in OAR 407-007-0210, who work or seek to work in facilities and positions subject to these rules who provide care.

Statutory/Other Authority: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, ORS 409.050, 410.020, 411.060, 413.036, 443.006, 443.725, 443.735

Statutes/Other Implemented: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, 411.060, 443.006, 409.010, 443.004

AMEND: 407-007-0610

RULE SUMMARY: this rule defines terms and words used in OAR 407-007-0600 to 407-007-0640. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the new background check system, ORCHARDS. The Department is proposing to make the temporary changes permanent, as well as update the rule to match current Oregon statutes.

CHANGES TO RULE:

407-007-0610

Definitions ¶¶

In addition to the definitions in OAR 125-007-0210, 407-007-0010, and 407-007-0210, the following definitions apply to OAR 407-007-0600 to 407-007-0640: ¶¶

(1) "Background check" means a criminal records check and an abuse check pursuant to OAR 407-007-0210 to 407-007-0370 and any additional checks as required per federal code or Oregon statute. ¶¶

(2) "Background Check Registry (Registry)" means a comprehensive listing of subject individuals who meet the requirements of these rules. ¶¶

~~(3) "Criminal Records Information Management System (CRIMS) user" means an individual who has been approved to use CRIMS. ¶¶~~

~~(4) "Facility" means: ¶¶~~

~~(a) A long term care facility in Oregon as defined in ORS 442.015 including skilled nursing facilities and intermediate care facilities. ¶¶~~

~~(b) A residential care facility as defined in ORS 443.400 including but not limited to assisted living facilities and intermediate care facilities. ¶¶~~

~~(c) An adult foster home as defined in ORS 443.705. ¶¶~~

~~(d) Any programs licensed, certified, endorsed, or otherwise regulated by the Department of Human Services that deliver services to individuals with intellectual or developmental disabilities. ¶¶~~

~~(54) "Good Standing," defined in OAR 407-007-0210, means the SI is in an approved status on the registry and may continue to work without active supervision (see OAR 407-007-0315(8Z)) in an approved status in allny current positions listed for the SI. ¶¶~~

~~(65) "Homecare worker" has the same meaning given in ORS 410.600, including but not limited to personal support workers and personal care attendants. ¶¶~~

~~(76) "Permanent hire date" means: ¶¶~~

~~(a) For an employee, temporary worker or contractor of a facility or a qualified entity, the date the qualified entity (QE) considers the SI to be approved, for the purposes of tracking the background check and any future required rechecks. ¶¶~~

~~(b) For SIs with portability, the permanently hired, after the background check approval date and when the SI is no longer considered provisional or working under active supervision pursuant to OAR 407-007-0315. ¶¶~~

~~(b) For a volunteer of a facility or a qualified entity, the date the QE considers the SI to be approved to volunteer for the QE, after the background check approval date. ¶¶~~

~~(c) For a homecare worker, the date the Department of Human Services (Department) or Authority enrolls the SI as a homecare worker and the homecare worker enrollment number is approved and active. For medical assistance programs this date is called the "enrollment" contract active dates date also means the date entered into ORCHARDS for starting in a new position. ¶¶~~

~~(7) "Portability," defined in OAR 407-007-0210, means the ability of an SI to use one approved background check for a defined period of time for immediate hirability for a position offered by a QE within a group as determined by the Department. ¶¶~~

~~(8) "Position" means the position listed in the background check request which determines whether the individual is an SI under OAR 407-007-0210. ¶¶~~

~~(9) "Qualified entity (QE)" means: ¶¶~~

- (a) A facility; ¶
- (b) An Area Agency on Aging (AAA) office or a Department or Oregon county Aging and People with Disabilities program branch which enrolls homecare workers; ¶
- (c) An agency, program or county office in Oregon serving individuals with intellectual or developmental disabilities; ¶
- (d) An agency, program or county office in Oregon serving individuals with mental illness which assists an individual to complete personal support worker enrollment; or ¶
- (e) The Department's Children's Intensive In-home Services program. ¶
- (f) A long term care referral entity pursuant to OAR 411-058-0000 to 411-058-0100. ¶
- (g) A staffing agency which provides staffing services to long term care skilled nursing facilities, residential care facilities, or assisted living facilities; and completed background checks through BCU in accordance with OAR 407-007-0200 to 407-007-0370.

Statutory/Other Authority: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, ORS 409.050, 410.020, 411.060, 413.036, 443.006, 443.725, 443.735

Statutes/Other Implemented: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, 411.060, 443.006, 409.010, 443.004

AMEND: 407-007-0620

RULE SUMMARY: This rule outlines the background check registry and portability within the registry for subject individuals with approved background checks completed in accordance with OAR 407-007-0200 to 407-007-0370. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the implementation of 2021 OR Law chapter 198 and for new background check system, ORCHARDS. The Department is proposing to make the temporary changes permanent, as well as update the rule to match current processing and Oregon statutes.

CHANGES TO RULE:

407-007-0620

Background Check Registry ¶¶

(1) The background check registry includes SIs who work or seek to work as: ¶¶

(a) An employee, contractor, temporary worker, or volunteer in a facility or qualified entity; or ¶¶

(b) A homecare worker, including the position of personal support worker. ¶¶

(c) An employee providing care to clients of the Department's Aging and People with Disabilities (APD) programs who works for an in-home care agency as defined by ORS 443.305 and OAR chapter 333, division 536, which has enrolled to deliver Medicaid funded services as described in OAR 411-033-0000 to 411-033-0030 for Department clients; ¶¶

(d) An employee, contractor, temporary worker, or volunteer in an agency certified, licensed, or otherwise regulated by the Department or the Authority where the Department or Authority has indication in the Oregon Administrative Rules that govern the certification, licensure, or regulation of the agency by the Department or the Authority that placement on the registry or portability is allowed for the SIs; or ¶¶

(e) An employee, contractor, temporary worker, or volunteer in an agency certified, licensed, or otherwise regulated by the Department or the Authority where the Department or Authority has a written agreement with BCU to allow portability. The written agreement must include: ¶¶

(A) A citation of the Oregon Administrative Rules that govern the certification, licensure, or regulation of the agency by the Department or the Authority; and ¶¶

(B) The number of years of the SI's background check may be used for portability before a recheck is required. ¶¶

(2) The background check registry does not include SIs who work or seek to work as an employee or volunteer for: ¶¶

(a) A community developmental disabilities program (OAR 411-320-0010 to 411-320-0200); ¶¶

(b) A developmental disabilities brokerage (OAR 411-340-0010 to 411-340-0180) ¶¶

(c) The Department of Human Services. ¶¶

~~(3) An SI on the registry includes SIs who have a record of a background check with an outcome of approved or approved with restrictions in CRIMS dated on or after January 1, 2015 with no subsequent~~
has a background check completed pursuant to OAR 407-007-0200 to 407-007-0370. If an SI has an approved background check with an outcome other than approved or approved with restrictions, the Department may also determine that the SI has portability. ¶¶

(4) The registry shall include information regarding the SI including but not limited to: ¶¶

(a) Name and other identifying information. ¶¶

(b) Date of background check approval. ¶¶

~~(c) Current position outcome. ¶¶~~

(c) The QE submitting the background check. ¶¶

(d) The position and description of duties being considered for the background check.. ¶¶

(e) If the background check outcome is approved and BCU determines that SI has portability: ¶¶

(A) The name of a QE that hires the SI; ¶¶

(B) The permanent hire date for any position into which a QE hires the SI; ¶¶

~~(C) QE for each current~~
The position and descriptions of duties for which a QE has hired the SI; and ¶¶

(D) The last day of work for any position into which a QE has hired the SI once the SI leave the position. ¶¶

~~(e) Pf) If the background check outcome is approved or approved with restrictions and BCU determines that SI does not have portability: ¶~~

~~(A) The permanent hire date in for the position at each QE, into which the QE has hired the SI; and ¶~~

~~(fB) The last day of work for each position at each QE, the position into which the QE has hired the SI once the SI leaves the position.. ¶~~

~~(g) If the background check outcome is denied, ineligible, or there is no fitness determination for any reason, and the SI was hired on a preliminary basis for any length of time: the last day of work for the position into which the QE has hired the SI once the SI leaves the position. ¶~~

(5) The Department shall complete not more than one criminal records check every ~~two year~~ 18 months on an SI subject to ORS 443.004(1)(b), effective as of the completion of an SI's first background check after the implementation of ORS 443.004(1)(b) (Or Law 20219, chapter ~~423198~~), on ~~September 29~~ June 8, 20219. A criminal records check, as part of a new background check, may be completed more often only if the Department:

- ¶
- (a) Receives credible evidence of a new criminal conviction; ¶
- (b) Receives credible evidence potentially disqualifying abuse; ¶
- (c) Is required by federal law to conduct more frequent criminal records checks; or ¶

(d) Is notified that a SI has changed positions or duties for which there are different criminal records check requirements. ¶

~~(e) If the Department determines that a new fitness determination is necessary and~~ Determines that it would be burdensome for an SI to wait for a new criminal records check, is not allow ~~including but not limited, to: ¶~~

~~(A) The Department may complete a new abuse check and use information from the most recent criminal records check completed on the SI in the Department's records. An example of when a new fitness determination is necessary, and a new criminal records check is not allowed, is when BCU learns of a new potentially disqualifying condition, receives credible evidence of a change in circumstances that could positively impact a previous fitness determination; or ¶~~

~~(B) The SI is seeking certification, licensure, or some other qualification associated with his or her job that requires a background check. ¶~~

(6) BCU shall either immediately remove an SI from the registry and the SI shall no longer be in portability, revoke an SI's good standing, or both if: ¶

(a) BCU received credible evidence indicating that SI has any new potentially disqualifying convictions or conditions; or ¶

(b) A subsequent background check results in any outcome other than approved. ¶

(7) To remain in good standing on the registry or to have portability: ¶

(a) The SI must have an approved background check completed pursuant to OAR 407-007-0200 to 407-007-0370 within the past 24 months a defined timeframe, based on federal or state requirements, populations served, types of QEs where the position is held, or types of position; or ¶

(b) If within 120 days of expiration from the registry: ¶

(A) The SI's qualified entity must submit a new background check request pursuant to OAR 407-007-0200 to 407-007-0370 no later than the SI's expiration date or as required by the collective bargaining agreement or program rules; and ¶

(B) In the new background check request, the Department finds no information that would lead to a revocation of the SI working pursuant to OAR 407-007-0315. ¶

(8) If the SI is required to have a Provider Enrollment Agreement filed with the Department, the SI must have a complete ad background check pursuant to OAR 407-007-0200 to 407-007-0370 at least 24 months with an outcome of approved or approved with restrictions within the expiration requirements of the Provider Enrollment Agreement.

Statutory/Other Authority: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, ORS 409.050, 410.020, 411.060, 413.036, 443.006, 443.725, 443.735

Statutes/Other Implemented: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, 411.060, 443.006, 409.010,

443.004

AMEND: 407-007-0630

RULE SUMMARY: This rule provides details on what needs to be reported about subject individuals subject to OAR 407-007-0600 to 407-007-0640 regarding their employment or placement. This rule was updated with a temporary filing, effective 6/25/2021 with changes needed for the new background check system, ORCHARDS. The Department is proposing to make the temporary changes permanent, as well as update the rule for current processing.

CHANGES TO RULE:

407-007-0630

Reporting Requirements for Qualified Entities ¶¶

(1) ~~CRIMORCHARDS~~ users for qualified entities, facilities and homecare workers may access the registry online through ~~CRIMORCHARDS~~. ¶¶

(2) If an SI is not found in a search of the online registry, ~~CRIMORCHARDS~~ users may enter a background check request in ~~CRIMORCHARDS~~ to determine if the SI may be placed on the registry to work. ¶¶

(3) QEs shall provide BCU with the following information regarding an SI on the registry including but not limited to: ¶¶

(a) Permanent hire date of SI for each position, to be added in ORCHARDS. ¶¶

(b) Report of any potentially disqualifying convictions or conditions (see OAR 407-007-0281 and 407-007-0290): BCU shall determine if the SI must be removed from the registry to allow for the submission of while the SI is still working for the QE, to be reported directly to BCU. BCU shall determine if the QE's ORCHARDS user shall be required to submit a new background check on the SI, pursuant to OAR 407-007-0220. ¶¶

~~(c) Change of position with the QE.~~ ¶¶

~~(d) The SI's last day of work once the SI leaves a position, to be added in ORCHARDS.~~ ¶¶

(d) Change of position with the QE, to be added in ORCHARDS.

Statutory/Other Authority: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, ORS 409.050, 410.020, 411.060, 413.036, 443.004, 443.725, 443.735, 443.006

Statutes/Other Implemented: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, 411.060, 443.004, 443.725, 443.735, 409.010, 443.006