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RULES:

407-007-0210, 407-007-0220, 407-007-0250, 407-007-0279, 407-007-0281, 407-007-0290, 407-007-0315, 407-007-0318, 407-007-0320

AMEND: 407-007-0210

REPEAL: Temporary 407-007-0210 from DHS 31-2022

RULE TITLE: Definitions

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule provides the definitions for terms used in OAR 407-007-0200 through 407-007-0370. This permanent rule filing includes language regarding the removal of child care provider subject individuals (moving to Department of Education, Office of Child Care); an update of who are subject individuals for Room & Board facilities registered with the Oregon Department of Human Services, Aging and People with Disabilities; the addition of individuals subject to ORS 475A and OAR 333-333-4100; and updates to OAR references.

RULE TEXT:

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) "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) "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" a conviction or condition from a federal law, regulation or directive that would prohibit the SI from holding the position listed in the background check request.
- (6) "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.
- (8) "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 419-440-0010 to 419-440-0210.
- (9) "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).
- (10) "QE designee (QED)" means an approved SI appointed by the QE's appointing authority to handle background checks on behalf of the QE.
- (11) "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.
- (12) "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 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 who works and provides care or has direct contact with clients, client information, or client funds.
- (F) Except as excluded in section (12)(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 419, division 400:
- (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 419 division 400; 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) An individual subject to ORS 475 and OAR 333-333-4100, including:
 - (i) Any person identified as an applicant on a worker permit or license application under OAR chapter 333, division 333; or
 - (ii) Any licensee or work permit holder who is applying for a renewal under OAR chapter 333, division 333.
- (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 (12)(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 associated with a room and board facility pursuant to OAR chapter 411, division 68, including:
 - (i) Any registered operator or registration applicant; or
 - (ii) All persons intending to work in, or currently working in a room and board facility, including, but not limited to, tenant managers, including trainees, and licensed healthcare workers when employed by or contracted with the registrant or the room and board facility.
- (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 to 0030 for Department clients.
- (R) Any individual who is required to complete a background check pursuant to Department or Authority program rules, 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 (12)(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 allows 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 (12)(a)(A)-(E) and (12)(a)(G)-(S) of this rule, or if the facility is dually licensed for different populations of vulnerable

individuals.

(D) Individuals required to complete a background check through the Central Background Registry under the Office of Child Care of the Oregon Department of Education (known as the Department of Education, Early Learning Division effective 7/1/2023).

(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 must 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, extended stay centers, 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, ORS 475A.486

STATUTES/OTHER IMPLEMENTED: ORS 181A.200, 409.027, ORS 181A.195, 443.004, ORS 418.248, ORS 475A.486

AMEND: 407-007-0220

RULE TITLE: Background Check Required

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule explains when the Background Check Unit (BCU) requires a background under OAR 407-007-0200 to 407-007-0370 for different populations. In this permanent filing BCU is removing language regarding child care providers subject individuals (SIs) because as of 9/1/2022: all of these SIs now have their checks conducted by the Central Background Registry under the Department of Education early Learning Division (Department of Early Learning and Care as of July 1, 2023); BCU is also adding information regarding criminal records check requirements for SIs who are subject to ORS 475A and OAR 333- 333-4100.

RULE TEXT:

(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 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), BCU must either immediately 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 rules.

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 do not prohibit additional clients; or
 - (C) Approved but not 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 do not prohibit additional clients; or
 - (c) Approved but not having portability pursuant to OAR 407-007-0600 to 407-007-0640.
- (6) Regardless of section (1) of this rules, an individual subject to ORS 475A and OAR 333-333-4100 follows the criminal records check requirements in ORS chapter 475A and OAR 333-333-4100.
- (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 must complete not more than one criminal records check every 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 2021 chapter 198), on June 8, 2021.
 - (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;
 - (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 must document that no new background check may be completed for the new position pursuant to ORS 443.004 and OAR 407-007-0220(10)(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, 443.004

AMEND: 407-007-0250

RULE TITLE: Background Check Process

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule provides guidance for the background check process including when fingerprints are required. In this permanent filing, the Background Check Unit (BCU) is removing language regarding child care providers subject individuals (SIs) because as of 9/1/2022, all of these SIs have their checks conducted by the Central Background Registry under the Department of Education early Learning Division (Department of Early Learning and Care as of July 1, 2023). BCU also clarifies in this rules that SIs subject to ORS 475A and OAR 333-333-4100 are not to have an abuse check or consider anything in OAR 407-007-0290 as potentially disqualifying. References to OARs are updated.

RULE TEXT:

- (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 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 handles 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).
- (3) If a national criminal records check is necessary, OSP provides BCU results of national criminal records checks conducted pursuant to ORS 181A.195, including fingerprint identification, through the FBI.
- (4) The criminal records check may include one or more types of criminal records checks as defined in OAR 407-007-0010. BCU considers the date of the last criminal records check completed before the final fitness determination as the date of the background check's criminal records check.
- (5) BCU conducts abuse checks on an SI using available abuse investigation reports and associated documents.
- (6) For SIs subject to ORS 475A and OAR 333-333-4100:
 - (a) Section (5) of this rule does not apply.
 - (b) None of the conditions listed in OAR 407-007-0290 are potentially disqualifying.
- (7) A QE and SI must use ORCHARDS to request a background check. In accordance with OAR 125-007-0220, the background check request includes 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 419 division 400, 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) 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.

(i) 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.

(j) 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 must 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.

(8) The background check request must 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 conducts 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.

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

(10) BCU conducts 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.

(11) 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) If an SI is under the age of 18 years old, BCU must request a fingerprint capture in accordance with OAR 125-007-0220(3).

(c) The SI must complete and submit a fingerprint capture when requested by BCU within the time frame indicated in a written notice. BCU sends the request to the QE and the QED must 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.

(12) 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 must 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.

(13) 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 must 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.

(14) 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.

(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.

(15) The criminal records check may include one or both types of criminal records checks as defined in OAR 407-007-0010.

(16) 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.

(17) 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.

(18) If BCU determines that an SI has additional potentially disqualifying convictions or conditions which have occurred after receiving the background check request, BCU must provide the SI, if available, the opportunity to disclose any information required in section (6) of this rule before completion of the final fitness determination.

(19) 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 may 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 may provide the SI, if available, the opportunity to disclose any information required in section (7) of this rule before completion of the final fitness determination.

(20) If the criminal records check process results in an incomplete fitness determination as described in OAR 407-007-0320(2)(d), BCU closes the criminal records check. When a criminal records check results in an incomplete fitness determination, the SI must not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the criminal records check request. An incomplete fitness determination results in immediate termination, dismissal, or removal of the SI.

(21) BCU must document criminal records checks conducted under this rule.

STATUTORY/OTHER AUTHORITY: ORS 181A.200, 409.027, 409.050

STATUTES/OTHER IMPLEMENTED: ORS 181A.200, ORS 181A.195, 409.010, 418.248, 443.004

AMEND: 407-007-0279

RULE TITLE: Federal Mandatory Exclusions

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule provides specific information on mandatory exclusions based on federal directives that might impact a background checks under OAR 407-007-0200 to 407-007-0370. In this permanent filing, the Background check Unit is removing language regarding child care providers subject individuals (SIs) because as of 9/1/2022, all of these SIs have had their checks conducted by the Central Background Registry under the Department of Education

early Learning Division (Department of Early Learning and Care as of July 1, 2023); OAR references are updated.

RULE TEXT:

(1) 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 ineligibility for an SI if the convictions or conditions meet certain time frames or criteria in 42 USC 1320a-7(c).

(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) 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;

(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 subsection;

(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 withdraws the background check application before submitting it because the SI is not eligible for the position; or

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

(d) Convictions or conditions requiring mandatory exclusion include but are not limited to:

(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 Office of the Inspector General's (OIG's) Exclusion list, an SI remains ineligible for the following periods of time:

(A) The minimum period of exclusion is 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 is 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 is permanent.

(f) 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. When a background check results in an incomplete fitness determination, the SI shall not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request. An incomplete fitness determination must result in immediate termination, dismissal, or removal of the SI.

(g) A determination of ineligibility due to mandatory exclusion is subject to appeal rights only if allowed under 42 UCS 1320a-7(g).

(h) If the SI no longer appears on the OIG's List of Excluded Individuals, the SI is subject to a fitness determination under OAR 125-007-0260 and 407-007-0320.

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

(a) Section (2) of this rule applies to an SI who 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 must 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), a 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. When a background check results in an incomplete fitness determination, the SI must not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request. An incomplete fitness determination must result in immediate termination, dismissal, or removal of the SI.

(d) A determination of ineligibility due to mandatory exclusion is not subject to appeal rights under OAR 125-007-0300, 407-007-0330, or 943-007-0501.

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

(a) Section (3) of this rule applies to the following SIs:

(A) An SI who is an employee of a 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 419 division 400 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 must 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 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. When a background check results in an incomplete fitness determination, the SI must not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request. An incomplete fitness determination must result in immediate termination, dismissal, or removal of the SI.

(d) A determination of 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 TITLE: Potentially Disqualifying Convictions

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule lists potentially disqualifying convictions considered under OAR 407-007-0200 to 407-007-0370. In this permanent filing, the Background check Unit (BCU) is removing language regarding child care providers subject individuals (SIs) because as of 9/1/2022, all of these SIs have their checks conducted by the Central Background Registry under the Department of Education early Learning Division (Department of Early Learning and Care as of July 1, 2023). BCU is adding language specifying what convictions are potentially disqualifying for SIs subject to ORS 475A and OAR 333-333-4100; updates to OAR references made.

RULE TEXT:

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 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 Department Child Welfare licensed child caring agency governed by OAR chapter 419 division 400.

(c) An SI, as listed in OAR 407-007-0210(12)(a)(H) associated with a child adoptive or foster home licensed by a child caring agency governed by OAR chapter 419 division 400.

(2) Potentially disqualifying convictions for SIs subject to ORS 475A and OAR 333-333-4100 include section (3) of this rule with the following exceptions:

(a) BCU may not consider the following for SIs applying for license or renewal of license:

(A) The manufacture of psilocybin or the manufacture of a marijuana item, as defined in ORS 475C.009, if:

(i) The date of the conviction is two or more years before the submission date of the application; and

(ii) The SI has not been convicted more than once for the manufacture of psilocybin or a marijuana item; or

(B) The possession of a controlled substance, as defined in ORS 475.005, or a marijuana item, as defined in ORS 475C.009, if:

(i) The date of the conviction is two or more years before the date of the application; or

(ii) The person has not been convicted more than once for the possession of a controlled substance or a marijuana item.

(b) BCU may only consider the following for SIs applying for a permit or renewal of a permit:

(A) Any felony conviction; or

(B) Any felony or misdemeanor conviction under OAR ORS 475A.210 to 475A.722 if the date of the conviction is less than two years before the date of the application or renewal.

(3) 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 murder

(B) ORS 163.107, Murder I

(C) ORS 163.115, Murder II

(D) ORS 163.118, Manslaughter I

(E) ORS 163.125, Manslaughter II

(F) ORS 163.145, Criminally negligent homicide

(G) ORS 163.149, Aggravated vehicular homicide

(H) ORS 163.165, Assault III

- (I) ORS 163.175, Assault II
- (J) ORS 163.185, Assault I
- (K) ORS 163.187, Strangulation
- (L) ORS 163.200, Criminal mistreatment II
- (M) ORS 163.205, Criminal mistreatment I
- (N) ORS 163.225, Kidnapping II
- (O) ORS 163.235, Kidnapping I
- (P) ORS 163.263, Subjecting another person to involuntary servitude in the second degree
- (Q) ORS 163.264, Subjecting another person to involuntary servitude in the first degree
- (R) ORS 163.266, Trafficking in persons
- (S) ORS 163.275, Coercion
- (T) ORS 163.355, Rape III
- (U) ORS 163.365, Rape II
- (V) ORS 163.375, Rape I
- (W) ORS 163.385, Sodomy III
- (X) ORS 163.395, Sodomy II
- (Y) ORS 163.405, Sodomy I
- (Z) ORS 163.408, Unlawful sexual penetration II
- (AA) ORS 163.411, Unlawful sexual penetration I
- (BB) 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)
- (CC) ORS 163.415, Sexual abuse III
- (DD) ORS 163.425, Sexual abuse II
- (EE) ORS 163.427, Sexual abuse I
- (FF) 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
- (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
- (HH) ORS 163.435, Contributing to the sexual delinquency of a minor
- (II) ORS 163.445, Sexual misconduct, if the offender is at least 18 years of age
- (JJ) ORS 163.465, Public indecency
- (KK) ORS 163.467, Private indecency
- (LL) ORS 163.525, Incest, with a child victim
- (MM) ORS 163.535, Abandonment of a child
- (NN) ORS 163.537, Buying or selling a person under 18 years of age
- (OO) ORS 163.547, Child neglect I
- (PP) ORS 163.670, Using child in display of sexually explicit conduct
- (QQ) ORS 163.680, Paying for viewing a child's sexually explicit conduct
- (RR) ORS 163.684, Encouraging child sexual abuse I
- (SS) ORS 163.686, Encouraging child sexual abuse II
- (TT) ORS 163.687, Encouraging child sexual abuse III
- (UU) ORS 163.688, Possession of materials depicting sexually explicit conduct of a child I
- (VV) ORS 163.689, Possession of materials depicting sexually explicit conduct of a child II
- (WW) ORS 163.700, Invasion of personal privacy II
- (XX) ORS 163.701, Invasion of personal privacy I
- (YY) ORS 163A.005, All crimes listed in definition of "Sex Crime," including Transporting child pornography into the state

(ZZ) ORS 164.055, Theft I
(AAA) ORS 164.057, Aggravated theft I
(BBB) ORS 164.098, Organized retail theft
(CCC) ORS 164.125, Theft of services
(DDD) ORS 164.215, Burglary II
(EEE) ORS 164.225, Burglary I
(FFF) ORS 164.325, Arson I
(GGG) ORS 164.377, Computer crime
(HHH) ORS 164.405, Robbery II
(III) ORS 164.415, Robbery I
(JJJ) ORS 165.013, Forgery I
(KKK) ORS 165.022, Criminal possession of a forged instrument I
(LLL) ORS 165.032, Criminal possession of a forgery device
(MMM) ORS 165.800, Identity theft
(NNN) ORS 165.803, Aggravated identity theft
(OOO) ORS 167.012, Promoting prostitution
(PPP) ORS 167.017, Compelling prostitution
(QQQ) ORS 167.057, Luring a minor
(RRR) ORS 167.320, Animal abuse I
(SSS) ORS 167.322, Aggravated animal abuse I
(TTT) ORS 167.333, Sexual assault of animal
(UUU) ORS 475.752(1), (2) and (6), Prohibited acts generally (regarding delivery and manufacture drug crimes; formerly ORS 475.840, 2005-2011)
(VVV) ORS 475.806, Unlawful manufacture of hydrocodone
(WWW) ORS 475.808, Unlawful manufacture of hydrocodone within 1,000 feet of school
(XXX) ORS 475.810, Unlawful delivery of hydrocodone
(YYY) ORS 475.812, Unlawful delivery of hydrocodone within 1,000 feet of school
(ZZZ) ORS 475.816, Unlawful manufacture of methadone
(AAAA) ORS 475.818, Unlawful manufacture of methadone within 1,000 feet of school
(BBBB) ORS 475.820, Unlawful delivery of methadone
(CCCC) ORS 475.822, Unlawful delivery of methadone within 1,000 feet of school
(DDDD) ORS 475.826, Unlawful manufacture of oxycodone
(EEEE) ORS 475.828, Unlawful manufacture of oxycodone within 1,000 feet of school
(FFFF) ORS 475.830, Unlawful delivery of oxycodone
(GGGG) ORS 475.832, Unlawful delivery of oxycodone within 1,000 feet of school
(HHHH) 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)
(IIII) ORS 475.846, Unlawful manufacture of heroin
(JJJJ) ORS 475.848, Unlawful manufacture of heroin within 1,000 feet of school
(KKKK) ORS 475.850, Unlawful delivery of heroin
(LLLL) ORS 475.852, Unlawful delivery of heroin within 1,000 feet of school
(MMMM) ORS 475.866, Unlawful manufacture of 3,4-methylenedioxymethamphetamine
(NNNN) ORS 475.868, Unlawful manufacture of 3,4-methylenedioxymethamphetamine within 1,000 feet of school
(OOOO) ORS 475.870, Unlawful delivery of 3,4-methylenedioxymethamphetamine
(PPPP) ORS 475.872, Unlawful delivery of 3,4-methylenedioxymethamphetamine within 1,000 feet of school
(QQQQ) ORS 475.876, Unlawful manufacture of cocaine
(RRRR) ORS 475.878, Unlawful manufacture of cocaine within 1,000 feet of school

- (SSSS) ORS 475.880, Unlawful delivery of cocaine
- (TTTT) ORS 475.882, Unlawful delivery of cocaine within 1,000 feet of school
- (UUUU) ORS 475.886, Unlawful manufacture of methamphetamine
- (VVVV) ORS 475.888, Unlawful manufacture of methamphetamine within 1,000 feet of school
- (WWWW) ORS 475.890, Unlawful delivery of methamphetamine
- (XXXX) ORS 475.892, Unlawful delivery of methamphetamine within 1,000 feet of school
- (YYYY) ORS 475.904, Unlawful delivery of controlled substance within 1,000 feet of school
- (ZZZZ) ORS 475.906, Penalties for distribution to minors
- (AAAAA) ORS 475.908, Causing another person to ingest a controlled substance
- (BBBBB) ORS 475.910, Application of controlled substance to the body of another person
- (CCCCC) ORS 475.912, Unlawful delivery of imitation controlled substance
- (DDDDD) ORS 475.914, Prohibited acts for registrants (with the Oregon State Board of Pharmacy)
- (EEEE) ORS 475C.333, Prohibition against giving marijuana item as prize
- (FFFF) ORS 475C.345, Unlawful delivery of marijuana item
- (GGGGG) ORS 475C.349, Unlawful manufacture of marijuana item
- (HHHHH) 475C.369 Administration to another person under 18 years of age
- (IIIII) ORS 475C.373, Unlawful sale or delivery of marijuana paraphernalia
- (JJJJJ) Or Law 2021 Ch. 542 Sec. 41, Unlawful production of marijuana (to be repealed 1/1/2024)
- (KKKKK) 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
- (LLLLL) Any crime in any other jurisdiction that is the substantial equivalent of any of the Oregon crimes listed in section (3)(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 (3)(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 (3)(a) or (3)(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 (3)(a) of this rule.
 - (B) Any crime of attempt, solicitation, or conspiracy to commit a crime pursuant to ORS 161.405 or 161.435, or 161.450 included in section (3)(b).
 - (c) Two or more convictions of ORS 813.010 (Driving under the Influence of Intoxicants (DUII)) 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.
 - (A) A single conviction of a crime in section (3)(c) is not considered potentially disqualifying regardless of the date of conviction.
 - (B) If an SI has two or more convictions of a crime in section (3)(c) 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 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, 475A.250, 475A.483

AMEND: 407-007-0290

RULE TITLE: Potentially Disqualifying Conditions

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule lists the potentially disqualifying conditions for OAR 407-007-0200 to 407-007-0370. In this permanent filing, the Background check Unit (BCU) is removing language regarding child care providers subject individuals (SIs) because as of 9/1/2022, all of these SIs have had their checks conducted by the Central Background Registry under the Department of Education early Learning Division (Department of Early Learning and Care as of July 1, 2023). BCU is also adding language indicating that this rule does not apply to SIs subject to ORS 475A and OAR 333-333-4100.

RULE TEXT:

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. This rule does not apply to SIs subject to ORS 475A and OAR 333-333-4100.

(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 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, are also 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 42 USC 671(a)(20) under the State Plan for Foster Care and Adoption Assistance (the Adam Walsh Act of 2006) or who 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 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 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 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: 407-007-0315

RULE TITLE: Hired on a Preliminary Basis

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule explains under what conditions a qualified entity may hire a subject individuals (SI) on a preliminary basis during a background check subject to OAR 407-007-0200 to 407-007-0370; it also provides guidance on supervision of these SIs. In this permanent filing, the Background check Unit is removing language regarding child care providers SIs because as of 9/1/2022, all of these SIs have had their checks conducted by the Central Background Registry under the Department of Education early Learning Division (Department of Early Learning and Care as of July 1, 2023).

RULE TEXT:

- (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:
 - (a) During the period of time prior to a final fitness determination;
 - (b) For the position listed on the background check request; 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 as indicated in OAR 407-007-0250.
- (4) The QE may not hire a SI on a preliminary basis under any of the following circumstances:
 - (a) Program rules, Oregon statutes, or federal directives do not allow hiring on a preliminary basis.
 - (b) Once submitted in ORCHARDS, the background check record indicates that preliminary hire is not allowed and the QE does not subsequently request a review by BCU as indicated in section (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 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) BCU has 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 not hiring on a preliminary basis may only be overturned by the BCU.
- (5) If requested by the QED, BCU may review a newly submitted background check request when 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, BCU updates the SI's status accordingly. 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. If BCU makes a positive decision in the preliminary fitness determination, BCU updates 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 must revoke hiring of the SI on a preliminary basis.

(6) An SI hired on a preliminary basis must be actively supervised at all times unless sections (7) or (8) of this rule apply.

(a) The individual providing active supervision at all times must 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 (6)(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, or personal care assistants.

(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 is 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.

(7) 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 since the previous background check. If BCU finds evidence of criminal activity or potentially disqualifying abuse since the previous background check, BCU may revoke working on a preliminary basis.

(8) 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.

(9) 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.

(10) 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.

(11) 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 TITLE: Approval for "Family First" Subject Individuals

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule describes specific background check approval for certain subject individuals (SIs). All of these have been employees of a child caring agency licensed by ODHS Child Welfare, OAR 413-215-0001 to 413-215-1031. OAR Chapter 413, division 215 is now moving to OAR Chapter 419 and several different divisions. This permanent rulemaking is an update of the OAR reference.

RULE TEXT:

(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 ODHS Child Welfare, OAR Chapter 419;

(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 must 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: 407-007-0320

RULE TITLE: Final Fitness Determinations

NOTICE FILED DATE: 12/02/2022

RULE SUMMARY: This rule explains the possible outcomes of a background check subject to OAR 407-007-0200 to 407-007-0370, including the criteria for each outcome. In this permanent filing, the Background Check Unit is removing language regarding child care providers subject individuals (SIs) because as of 9/1/2022, all of these SIs have had their checks conducted by the Central Background Registry under the Department of Education early Learning Division (Department of Early Learning and Care as of July 1, 2023). BCU is also updating language, changing "CRIMS" references to "ORCHARDS."

RULE TEXT:

(1) A final fitness determination pursuant to OAR 125-007-0260 and these rules will be made after all necessary background checks have been received and a weighing test, if necessary, has been completed. For the purpose of a final fitness determination as defined in OAR 407-007-0010(18), an authorized designee includes:

(a) A BCU staff trained to make a final fitness determination;

(b) A BCU hearing representative if a fitness determination is contested under OAR 407-007-0330 or 943-007-0501;
or

(c) An administrative law judge if a contested fitness determination results under a contested case hearing through the Office of Administrative Hearings.

(2) The final fitness determination results in one of the following outcomes:

(a) The authorized designee may approve an SI if:

(A) The SI has no potentially disqualifying convictions or potentially disqualifying conditions; or

(B) The SI has potentially disqualifying convictions or potentially disqualifying conditions and, after a weighing test, the authorized designee determines that more likely than not, the SI poses no risk to the physical, emotional, or financial well-being of vulnerable individuals.

(b) The authorized designee may approve an SI with restrictions if the SI has potentially disqualifying convictions or potentially disqualifying conditions and, after a weighing test, the authorized designee determines that more likely than not the SI poses no risk to the physical, emotional, or financial well-being of vulnerable individuals if certain restrictions are placed on the SI. Restrictions may include but are not limited to restrictions to one or more specific clients, job duties, or environments. A new background check and fitness determination shall be completed on the SI before removing a restriction.

(c) The authorized designee shall deny an SI if the SI has potentially disqualifying convictions or potentially disqualifying conditions and, after a weighing test, the authorized designee determines more likely than not the SI poses a risk to the physical, emotional, or financial well-being of vulnerable individuals.

(d) In the following situations the SI shall have no hearing rights and the authorized designee shall consider a background check to have an outcome of incomplete fitness determination:

(A) The QE or SI discontinues the application or fails to cooperate with the background check or fitness determination process, including but not limited to failure to disclose all requested criminal, abuse or other information, refusal to be fingerprinted or failing to respond in a timely manner to written correspondence from BCU. The background check request is considered closed.

(B) BCU determines that the SI is ineligible due to ORS 443.004 in accordance with OAR 407-007-0275 or 407-007-0277. The background check request is considered completed.

(C) BCU or the QE withdraws or closes the background check request before a final fitness determination for any reason. The background check request is considered closed.

(D) The SI withdraws the application, leaves the position prior to completion of the background check, or the Department cannot locate or contact the SI. The background check request is considered closed.

(E) The QE determines that the SI ineligible for the position for reasons other than the background check. The

background check request is considered closed.

(F) The SI who is a proctor foster parent and fails to provide a release of information, the background check request is considered closed.

(G) The authorized designee determines that the final fitness determination is Mandatory exclusion due to the SI being subject to OAR 407-007-0279 and having a conviction or condition listed in OAR 407-007-0279. The background check request is considered completed.

(3) Upon completion of a final fitness determination, BCU or the QE shall provide notice to the SI.

(a) If approved, BCU shall provide notice to the QE through ORCHARDS. The QE shall provide the SI a copy of the notice or ORCHARDS documentation.

(b) If denied or approved with restrictions, BCU shall issue a notice of fitness determination to the SI which includes the potentially disqualifying convictions or conditions that the outcome was based upon, information regarding appeal rights, and the notice becoming a final order in the event of a withdrawal or failure to appear at the hearing.

(c) The effective date of action shall be recorded on the notice or ORCHARDS documentation.

(4) BCU shall provide the QED notification of the final fitness determination when the SI is being denied or approved with restrictions.

(a) The notice to the QED shall not contain any details regarding the potentially disqualifying convictions or conditions.

(b) If the final fitness determination is approved with restrictions, BCU shall inform the QED of the restrictions required on the SI and the SI's position.

(5) When an SI is denied or the background check results in an incomplete fitness determination, the SI shall not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request. A denial applies only to the position and application in question. A denial or incomplete fitness determination shall result in immediate termination, dismissal, or removal of the SI.

(6) When an SI is approved with restrictions, the SI shall only be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request and only under the stated restrictions. A restricted approval applies only to the position and application in question. A restricted approval shall result in immediate implementation of the restrictions.

(7) BCU shall maintain any documents obtained or created during the background check process.

(8) BCU shall make new fitness determinations for each background check request. The outcome of previous fitness determinations does not set a precedent for subsequent fitness determinations.

STATUTORY/OTHER AUTHORITY: ORS 181A.200, 409.027, 409.050

STATUTES/OTHER IMPLEMENTED: ORS 181A.195, 181A.200, 409.010, 409.027, 443.004, 418.248