

ADMINISTRATIVE AGENCY RULE REPORT
75 O.S. Supp. 2000, § 303.1
SUBMITTED TO THE GOVERNOR AND TO THE LEGISLATURE

1. Date the Notice of Intended Rulemaking was published in the Oklahoma Register:

October 1, 2013, Vol. 31, No. 2 Ok Reg 3, Docket No. 13-1185

2. Name and address of the Agency:

Oklahoma State Department of Health
1000 N.E. Tenth Street
Oklahoma City, Oklahoma 73117-1299

3. Title and Number of the Rule:

Title 310. Oklahoma State Department of Health
Chapter 2. Chapter 2, Procedures of the State Department of Health

4. Citation to the Statutory Authority for the Rule:

Title 63 O.S. § 1-104; and Title 63 O.S. § 1-1947(T)(2) and 1-1947(Y).

5. Brief Summary of the Content of the Adopted Rule:

This proposal promulgates new rules in the procedures of the Department of Health as required in amendments to the Long Term Care Security Act (Title 63 O.S. § 1-1944 et. seq.), as adopted in 2012, [House Bill 2582](#). This bill authorized fingerprint based criminal history background checks on those applicants who would be employed in a variety of long-term care settings as defined in the law at [Title 63 O.S. Section 1-1945\(4\)](#). The law at [Title 63 O.S. § 1-1947\(T\)\(2\)](#) requires that the Department shall specify rules for issuing a waiver of the disqualification or employment denial and further specifies in paragraph (Y) the State Board of Health shall promulgate rules prescribing effective dates and procedures for the implementation of a national criminal history record check for the employers and nurse aide scholarship programs defined in Section 1-1945 of Title 63 of the Oklahoma Statutes.

6. Statement explaining the Need for the Adopted Rule:

This rulemaking action is submitted for both Emergency and Permanent promulgation. This action is necessary to provide for the staggered effective dates authorized in law; to protect the safety of vulnerable populations by implementing without further delay a more rigorous national criminal history records check for those caring for vulnerable adults in our state; and, to implement the program while grant dollars are available, thereby reducing the cost to the State, providers and applicants for background checks. An extension to the current grant, awarded for the exploration and development of a fingerprint based national background check, has been offered to April of 2015. Upon an effective date for fingerprinting, grant funds will be utilized for seventy-five percent (75%) of fingerprinting costs for the duration of the grant. For each month's delay in an effective date approximately eighty thousand dollars (\$80,000) of grant funds will not be captured to assist in program start-up costs. The implementation dates for this program were dependent on software development and contracting with a vendor for a statewide network to provide live scan collection and digital submission of fingerprints to the State Bureau

of Investigation. The software and live scan network contract were completed in December 2013.

7. Date and Location of the Meeting at which such Rules Were Adopted:

Adopted December 10, 2013, in the offices of the Oklahoma State Department of Health.

8. Summary of the Comments and Explanation of Changes or Lack of any Change Made in the Adopted Rules as a Result of Testimony Received at Public Hearings:

The Department received comment on the proposed schedule for implementation and anticipated revisions to the schedule to push back the initial effective date and extend the implementation period. The feedback supported using staggered effective dates for the various provider types and supported extending the implementation period over a longer period to allow for a more gradual inclusion of the various types of providers. The Department concurred in the recommendations and revised the schedule of effective dates allowing providers to begin submission as of February 1, 2014, but no later than the effective date proposed, which differs for the various provider and industry segments. The latest effective date will be August 1, 2014.

The Department concurred with the recommendation to create provisions for use of a name based background check where circumstances prohibit the collection of a fingerprint based criminal history record and installed language in section 310:2-29-3.

The Department revised the effective dates for the Nurse Aide Scholarship Program in 310:2-29-3 based on comment from the Oklahoma Health Care Authority related to the ability of the training programs to process applicants within the current contract and budget. The rule was modified to authorize a referral to the Department for registry screening and authorization to collect fingerprints, where necessary, and the effective date for the SoonerCare Nurse Aide Scholarship Program now coincides with contracts issued in the Fiscal Year beginning July 1, 2014.

9. List of Persons or Organizations Who Appeared or Registered For or Against the Adopted Rule at Any Public Hearing Held by the Agency or Those Who Have Commented in Writing Before or After the Hearing:

The following persons or organizations appeared in public meetings or contacted the Department to comment and/or express support for the rule changes:

A regular meeting of the Long-Term Care Facility Advisory Board was held on October 9, 2013. Those board members present were: Kay Parsons, Chair; Dewey Sherbon, Vice Chair; Theo Crawley; Luke Tallant; Alan Mason; Wendell Short; Dustin Cox; Ivoria Holt; Linda Brannon; Donna Bowers; Diana Sturdevant; and Willie Burkhart.

Guests present at the board meeting included: Mary Brinkley, Leading Age OK; Marilyn Kipps, guest; Jim Kipps; Gina Stafford, OK Board of Nursing; Oralene Sherbon, general public; Joyce Clark, Achievis; Marietta Lynch, Oklahoma Association of Health Care Providers; Wes Bledsoe, A Perfect Cause; Bill Whited, State Long Term Care Ombudsman's Office; Greg Frogge, McAfee Taft; Trish Ewing, State Council on Aging; Mark Stratton, University of Oklahoma Department of Pharmacy; Keith Swanson, guest; Gara Wilsie, Sequoia Health Services.

The Advisory Board has been an ongoing participant in the development of the program including the formative legislation. The board was provided the proposed rule and draft Rule Impact Statement. The members were advised the Department was collecting comment on the proposed schedule for

implementation and that the Department anticipated revisions to the schedule to push back the initial effective date and extend the implementation period. A quorum of the Board was not present to allow a formal vote in support of the proposed rule. The members present expressed a consensus opinion in support of the rule and proposed no immediate changes to the rule. Members were advised of the Public Comment Hearing to be held November 1, 2013, at which time they could provide individual written or oral comments.

An Ad Hoc meeting of industry, state government and advocacy group representatives was held at the Department on October 30, 2013. Those present included: Gayla Freeman, DHS Aging Services Division; Eleanor Kurtz, DHS Aging Services Division; Jonathan Vanbeber, DHS Aging Services Division; Melissa Holland and Patrick Gaines, Oklahoma Assisted Living Association; Lori Baer, Leading Age; Esther Houser, State Long Term Care Ombudsman, Department of Human Services; Joe Wolfe and Jennifer Buckles, First Call Home Care Agency; Avis Hill, Oklahoma Health Care Authority; Donna Bowers, Daily Living Center. Those present participated in the suggested comments described above.

Micqueal Ware, Melinda Jones Thomason, and Beverly Blake with the Oklahoma Health Care Authority.

Esther Houser, State Long Term Care Ombudsman, Department of Human Services.

Becky Moore, Executive Director, Oklahoma Association of Health Care Providers.

No comments were filed in opposition to the rule.

10. Rule Impact Statement: Hereto annexed as Exhibit A.

11. Incorporation by Reference Statement: "n/a"

12. Members of the Governing Board of the Agency Adopting the Rules and the Recorded Vote of Each Member:

Murali Krishna, President, M.D. – aye
Ronald Woodson, Vice-President, M.D. – absent
Martha Burger, M.B.A, Secretary-Treasurer – aye
Jenny Alexopoulos, D.O. – absent
Terry Gerard, D.O. – absent
Robert S. Stewart, M.D. – aye
Tim Starkey, M.B.A. – aye
Cris Hart-Wolfe – aye

13. Additional information: Information regarding this rule may be obtained by contacting James Joslin, Service Director, Health Resources Development Service, Oklahoma State Department of Health, 1000 N.E. 10th Street, Oklahoma City, OK 73117-1207, phone 405-271-6868, or by e-mailing james@health.ok.gov.

RULE IMPACT STATEMENT

TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH CHAPTER 2. PROCEDURES OF THE STATE DEPARTMENT OF HEALTH

Before the Oklahoma State Board of Health December 10, 2013

1. DESCRIPTION:

This proposal promulgates new rules in the procedures of the Department of Health as required in amendments to the Long Term Care Security Act (Title 63 O.S. § 1-1944 et. seq.), as adopted in 2012, [House Bill 2582](#). This bill authorized fingerprint based criminal history background checks on those applicants who would be employed in a variety of long-term care settings as defined in the law at [Title 63 O.S. Section 1-1945\(4\)](#). The law at [Title 63 O.S. § 1-1947\(T\)\(2\)](#) requires that the Department shall specify rules for issuing a waiver of the disqualification or employment denial. The law further specifies in subsection Y that the State Board of Health shall promulgate rules prescribing effective dates and procedures for the implementation of a national criminal history record check for the employers and nurse aide scholarship programs defined in Section 1-1945 of Title 63 of the Oklahoma Statutes.

The following outlines the grounds for which, pursuant to Title 75 O.S. Section 253, the Department seeks Emergency adoption of the proposed rules. The requirements in Title 63 O.S. § 1-1947(Y), state, *the State Board of Health shall promulgate rules prescribing effective dates and procedures for the implementation of a national criminal history record check for the employers and nurse aide scholarship programs defined in Section 1-1945 of [Title 63 of the Oklahoma Statutes]. Said dates may be staggered to facilitate implementation of the requirements of this section.* This Emergency rulemaking action is necessary to provide for the staggered effective dates authorized in law; to protect the safety of vulnerable populations by implementing without further delay a more rigorous national background check for those caring for vulnerable adults in our state; and, to implement the program while grant dollars are available, thereby reducing the cost to the State and providers for background checks. An extension to the current grant, awarded for the exploration and development of a fingerprint based national background check, has been offered to April of 2015. Upon an effective date for fingerprinting, grant funds will be utilized for seventy-five percent (75%) of fingerprinting costs for the duration of the grant. For each months delay in an effective date approximately eighty thousand dollars (\$80,000) of grant funds will not be captured to assist in program costs. The implementation dates for this program were dependent on software development and contracting with a vendor for a statewide network to provide live scan collection and digital submission of fingerprints to the State Bureau of Investigation. The software and live scan network are now projected to be complete by December 1, 2013.

310:2-29-1, Purpose. This section specifies the purpose of the rules and authorizing Act.

310:2-29-3, Implementation. This section details procedures for implementing the law and creates staggered effective dates for the fingerprint based background check by various classes of employer. The staggered dates allow for a gradual increase in the volume of requests processed during the initial start-up.

310:2-29-5, Appeals. This section creates the procedures for requesting an appeal of the employment eligibility determination and the criteria to be applied by the hearing officer in making a determination whether the applicant merits a waiver of the applicant's determination of ineligibility. This section also specifies means an applicant may use to demonstrate that the information contained in the criminal history report is inaccurate. The criteria to be applied for the waiver are:

- (1) The time elapsed since the disqualifying criminal conviction, whether the applicant has fulfilled the sentence requirements, and whether there are any subsequent arrests or convictions of any nature;
- (2) Any extenuating circumstances such as the offender's age at the time of conviction, substance abuse history and treatment, or mental health issues and treatment;
- (3) Rehabilitation as demonstrated by character references and recommendation letters from past employers, the applicant's record of employment history, education, and training subsequent to conviction; and
- (4) The relevancy of the particular disqualifying information with respect to the proposed employment of the individual to include the job type and duties, the extent to which the applicant has unsupervised access to service recipients, whether the crime was committed against a vulnerable child or adult, and whether the conviction was related to an employer subject to the requirements of the Long Term Care Security Act.

2. DESCRIPTION OF PERSONS AFFECTED AND COST IMPACT RESPONSE:

Affected persons will be residents and their families as well as owners, operators, and applicants of employers defined within the Long Term care Security Act. This rule implements statute and creates no additional reporting or processing requirements beyond that required in the enabling legislation. When a disqualified applicant appeals the determination and requests a hearing they will incur costs in time and postage.

3. DESCRIPTION OF PERSONS BENEFITING, VALUE OF BENEFIT AND EXPECTED HEALTH OUTCOMES:

Those benefiting from the rule's implementation of fingerprint based criminal history background checks will be residents and their families as well as owners and operators. These groups benefit from enhanced employment screening tools creating a safer environment for vulnerable populations. The applicants found ineligible benefit by having an appeals procedure that allows for the consideration of extenuating or mitigating factors that might merit waiving the ineligible determination.

4. ECONOMIC IMPACT, COST OF COMPLIANCE AND FEE CHANGES:

There will be an economic impact to the applicants subject to a background check and to the employers seeking to employ an applicant. The costs for both the applicant and the employer are established in state statute. The monies derived from the costs to the applicant and the employer will cover the costs to obtain the background check and the long-term costs of implementation of the program.

5. COST AND BENEFITS OF IMPLEMENTATION AND ENFORCEMENT TO THE AGENCY:

The cost to the Department to implement the amendments will be approximately \$4,000 to cover the costs of rule drafting, adoption, publication, distribution, and education. The proposed rules will be implemented by Department personnel. The initial startup of the program is supported by a grant with long-term funding supported by the applicant's administrative fingerprinting fee and the employer's fee for obtaining the criminal history record results. These fees are as authorized in the enabling legislation, House Bill 2582 (2012).

Benefits to the Department of Health and the Department of Human Services will be more rigorous background checks for those Department staff whose responsibilities include visits to long-term care settings. These staff will be subject to the same fingerprint based national background check as staff working in long-term care settings. These Departments are also projected to benefit by reduced incidents of abuse, neglect and misappropriation in long term care settings.

6. IMPACT ON POLITICAL SUBDIVISIONS:

There are no anticipated impacts on political subdivisions, nor will it require their cooperation in implementing or enforcing the proposed amendment.

7. ADVERSE EFFECT ON SMALL BUSINESS:

No comments were submitted identifying adverse economic effects on small businesses as provided by the Oklahoma Small Business Regulatory Flexibility Act.

8. EFFORTS TO MINIMIZE COSTS OF RULE:

No less costly or non-regulatory methods have been identified.

9. EFFECT ON PUBLIC HEALTH AND SAFETY:

Implementation of fingerprint based criminal history background checks will yield a more credible work force caring for vulnerable residents in the long term care settings and is anticipated to reduce incidents of abuse, neglect and misappropriation in such settings.

10. DETRIMENTAL EFFECTS ON PUBLIC HEALTH AND SAFETY WITHOUT ADOPTION:

Lack of implementation of fingerprint based criminal history background checks will result in continued use of local name based background checks that do not account applicants who cross state lines to avoid their criminal history or who conceal their identity. These applicants are then eligible to work with vulnerable adults after having demonstrated behaviors that in some case are shown to be predictors of abuse, neglect and misappropriation.

11. This rule impact statement was prepared on August 16, 2013 and revised September 27, 2013, and November 8, 2013.

**TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH
CHAPTER 2. PROCEDURES OF THE STATE DEPARTMENT OF HEALTH**

RULEMAKING ACTION:

EMERGENCY adoption

RULES:

Subchapter 29. Criminal History Background Checks [NEW]

310:2-29-1. Purpose [NEW]

310:2-29-2. [RESERVED]

310:2-29-3. Implementation [NEW]

310:2-29-4. [RESERVED]

310:2-29-5. Appeals [NEW]

AUTHORITY:

Oklahoma State Board of Health, Title 63 O.S. Section 1-104; and Title 63 O.S. Sections 1-1947(T)(2) and 1-1947(Y).

DATES:

Comment Period:

October 1, 2013, through November 1, 2013

Public Hearing:

November 1, 2013

Adoption:

December 10, 2013

Effective:

Immediately on Governor's approval or February 1, 2014, whichever is later.

Expiration:

Effective through September 14, 2014, unless superseded by another rule or disapproved.

SUPERSEDED EMERGENCY ACTIONS:

"n/a"

INCORPORATION BY REFERENCE:

"n/a"

FINDING OF EMERGENCY:

Pursuant to Title 75 O.S. Section 253, the Department seeks Emergency adoption of the proposed rules. The requirements in Title 63 O.S. § 1-1947(Y), state, *the State Board of Health shall promulgate rules prescribing effective dates and procedures for the implementation of a national criminal history record check for the employers and nurse aide scholarship programs defined in Section 1-1945 of [Title 63 of the Oklahoma Statutes]. Said dates may be staggered to facilitate implementation of the requirements of this section.* This Emergency rulemaking action is necessary to provide for the staggered effective dates authorized in law; to protect the safety of vulnerable populations by implementing without further delay a more rigorous national criminal history records check for those caring for vulnerable adults in our state; and, to implement the program while grant dollars are available, thereby reducing the cost to the State, providers and applicants for background checks. An extension to the current grant, awarded for the exploration and development of a fingerprint based national background check, has been offered to April of 2015. Upon an effective date for fingerprinting, grant funds will be utilized for seventy-five percent (75%) of fingerprinting costs for the duration of the grant. For each months delay in an

effective date approximately eighty thousand dollars (\$80,000) of grant funds will not be captured to assist in program start-up costs. The implementation dates for this program were dependent on software development and contracting with a vendor for a statewide network to provide live scan collection and digital submission of fingerprints to the State Bureau of Investigation. The software and live scan network contract were completed in December 2013.

ANALYSIS:

This proposal promulgates new rules in the procedures of the Department of Health as required in amendments to the Long Term Care Security Act (Title 63 O.S. § 1-1944 et. seq.), as adopted in 2012, [House Bill 2582](#). This bill authorized fingerprint based criminal history background checks on those applicants who would be employed in a variety of long-term care settings as defined in the law at [Title 63 O.S. Section 1-1945\(4\)](#). The law at [Title 63 O.S. § 1-1947\(T\)\(2\)](#) requires that the Department shall specify rules for issuing a waiver of the disqualification or employment denial and further specifies in paragraph (Y) the State Board of Health shall promulgate rules prescribing effective dates and procedures for the implementation of a national criminal history record check for the employers and nurse aide scholarship programs defined in Section 1-1945 of Title 63 of the Oklahoma Statutes.

CONTACT PERSON:

James Joslin, Chief, Health Resources Development Service, Oklahoma State Department of Health, 1000 N.E. 10th Street, Oklahoma City, OK 73117-1207, phone 405-271-6868, or by e-mail to james@health.ok.gov.

PURSUANT TO THE ACTIONS DESCRIBED HEREIN, THE FOLLOWING EMERGENCY RULES ARE CONSIDERED PROMULGATED UPON APPROVAL BY THE GOVERNOR AS SET FORTH IN 75 O.S., SECTION 253(D), AND EFFECTIVE UPON APPROVAL BY THE GOVERNOR OR FEBRUARY 1, 2014, WHICHEVER IS LATER:

SUBCHAPTER 29. Criminal History Background Checks

310:2-29-1. Purpose

These rules implement the Long Term Care Security Act as established at Title 63 O.S. Section 1-1944 et seq., as amended.

310:2-29-2. [RESERVED]

310:2-29-3. Implementation

(a) Authority. Title 63 O.S. Section 1-1947(Y) authorized the Department to establish through rulemaking the effective dates of subsections D through V of Section 1-1945 of Long Term Care Security Act, by category of employer.

(b) Effective dates. The effective dates for subsections D through V of Section 1-1947 (relating to screening and fingerprint based background checks) are defined below.

(1) For the following, compliance may begin February 1, 2014, but shall be required no later than March 1, 2014:

(A) Adult Day Care Centers as defined by Section 1-872 of Title 63 of the Oklahoma Statutes; and

- (B) Residential care homes as defined by Section 1-820 Title 63 of the Oklahoma Statutes.
- (2) For Specialized Nursing Facilities licensed pursuant to Title 63 O.S. Section 1-1901 et seq., compliance may begin February 1, 2014, but shall be required no later than April 1, 2014:
- (3) For the following employers, compliance may begin February 1, 2014, but shall be required no later than May 1, 2014:
- (A) Applicants for employment with the State Department of Health and Department of Human Services whose responsibilities include working inside long term care facilities, pursuant to Title 63 O.S. Section 1-1947(A)(1); and
- (B) Nursing Facilities licensed pursuant to Title 63 O.S. Section 1-1901 et seq.,
- (4) For the following employers compliance may begin February 1, 2014, but shall be required no later than June 1, 2014:
- (A) Continuum of Care or Assisted Living facilities licensed pursuant to Title 63 O.S. Section 1-890.1 et seq.; and
- (B) Hospice programs licensed pursuant to Title 63 O.S. Section 1-860.1 et seq.
- (5) For Medicare Certified Home Care Agencies licensed pursuant to Title 63 O.S. Section 1-1960 et seq., compliance may begin February 1, 2014, but shall be required no later than July 1, 2014.
- (6) For all other employers defined in Title 63 O.S. Section 1-1945(4), compliance may begin February 1, 2014, but shall be required no later than August 1, 2014.
- (7) For Nurse Aide Scholarship Programs operated under contract with the Oklahoma Health Care Authority compliance may begin July 1, 2014, but shall be required no later than August 1, 2014.
- (8) For staffing agencies or independent contractors as defined in Title 63 O.S. Section 1-1945(4), compliance shall match the contracted employer.
- (9) Pursuant to Title 63 O.S. Section 1-1947(I)(5), *Medicaid home and community-based services waived providers as defined in Section 1915 (c) or 1915 (i) of the federal Social Security Act may voluntarily participate in the submission of fingerprints for applicants. In lieu of fingerprinting, said providers shall obtain a name-based state criminal history record check from the [Oklahoma State Bureau of Investigation] at the fee established in Section 150.9 of Title 74 of the Oklahoma Statutes. No other fees shall apply to said providers relying on a name-based state criminal history record check. The determination of employment eligibility shall be made by said providers based on the criteria established in subsection D of [Title 63 O.S. Section 1-1947].*

(c) Nurse Aide Scholarship Programs. For the purposes of complying with Title 63 O.S. Section 1-1947(G) (related to conducting a registry screening and criminal history record check), the Nurse Aide Scholarship Program may refer the applicant's application and release to the Department for registry screening and authorization to collect fingerprints.

(d) Alternate Name Based Background Check. Where the Department is unable to authorize the collection and submission of fingerprints through an authorized collection site pursuant to Title 63 O.S. Section 1-1947(I), the Department shall conduct a name based search of the applicant in the criminal history database maintained by the Oklahoma State Bureau of Investigation.

310:2-29-4. [RESERVED]

310:2-29-5. Appeals

(a) Notice. A determination by the Department that finds an applicant not eligible for employment

will result in a notice to the applicant to include the reasons why the applicant is not eligible for employment and a statement that the applicant has a right to appeal the decision made by the Department regarding the employment eligibility. The notice shall also include information regarding where to file and describe the appellate procedures [63 O.S. § 1-1947(K)(2)].

(b) **Days to initiate an appeal.** Pursuant to Title 63 O.S. 1-1947(T)1), any individual who has been disqualified from or denied employment by an employer pursuant to Title 63 O.S. Section 1-1947 may file an appeal with the Department within thirty (30) days of the receipt of the notice of disqualification.

(c) **Types of appeals.** An applicant may appeal the determination by:

(1) Challenging the finding that the applicant is the true subject of the results from a name-based registry background check;

(2) Challenging the criminal history record as inaccurate; or

(3) Requesting a waiver which gives the applicant the opportunity to demonstrate that the applicant should be allowed to work because he or she does not pose a risk to patients, facilities or their property.

(d) **Inaccuracy of criminal history record.** To demonstrate that the criminal history record is inaccurate, the applicant shall submit to the Department written documents, issued and certified by a governmental entity that demonstrate that the information contained in the criminal history report is inaccurate.

(e) **Criteria for consideration in a waiver review.** Pursuant to Title 63 O.S. Section 1-1947(T)(2), the Department shall consider the following criteria in considering whether the applicant merits a waiver of the applicant's determination of ineligibility:

(1) The time elapsed since the disqualifying criminal conviction, whether the applicant has fulfilled the sentence requirements, and whether there are any subsequent arrests or convictions of any nature;

(2) Any extenuating circumstances such as the offender's age at the time of conviction, substance abuse history and treatment, or mental health issues and treatment;

(3) Rehabilitation as demonstrated by character references and recommendation letters from past employers, the applicant's record of employment history, education, and training subsequent to conviction; and

(4) The relevancy of the particular disqualifying information with respect to the proposed employment of the individual to include the job type and duties, the extent to which the applicant has unsupervised access to service recipients, whether the crime was committed against a vulnerable child or adult, and whether the conviction was related to an employer subject to the requirements of the Long Term Care Security Act.

(e) **Where to file.** The applicant's appeal shall be submitted in writing to the Administrative Hearings Clerk for the Oklahoma State Department of Health, 1000 Northeast 10th Street, Oklahoma City, OK 73117, and shall address the criteria specified in (d) of this Section and how the applicant merits a waiver of the disqualification from employment.

(f) **Conduct of hearing.** The appeal shall be conducted as an individual proceeding pursuant to this Chapter and the Administrative Procedures Act.

RULE COMMENT SUMMARY AND RESPONSE

TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH CHAPTER 2. PROCEDURES OF THE STATE DEPARTMENT OF HEALTH

The rule report submitted to the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, pursuant 75:303.1(A) of the Administrative Procedures Act, shall include: (9) *A summary of the comments and explanation of changes or lack of any change made in the adopted rules as a result of testimony received at all hearings or meetings held or sponsored by an agency for the purpose of providing the public an opportunity to comment on the rules or of any written comments received prior to the adoption of the rule. The summary shall include all comments received about the cost impact of the proposed rules;* (10) *A list of persons or organizations who appeared or registered for or against the adopted rule at any public hearing held by the agency or those who have commented in writing before or after the hearing.*[75:303.1(E)(9)&(10)]

Name & Organization: Esther Houser, State Long Term Care Ombudsman, Department of Human Services. Letter dated October 31, 2013

Rule Subchapter and Section: 310:2-29-3. Implementation

Comment: Ms. Houser wrote,

We support the Department of Health in using “staggered” effective dates for the various provider types which will be permitted to participate in the Fingerprint Background Check program. However, as discussed in your 10/29/13 meeting with a variety of interested parties, we believe that the implementation schedule provided in the Draft Rule may be too ambitious. The LTC Ombudsman Program supports extending the implementation period over a longer period of (perhaps) 6 months, to allow for a more gradual inclusion of the various types of providers. This will be especially important when the larger employer groups are allowed to begin to participate in the program.

Response: The Department concurs in this recommendation and has proposed a revised schedule of effective dates allowing providers to begin submission as of February 1, 2014, but no later than the effective date proposed, which differs for the various provider and industry segments. The latest effective date will be August 1, 2014.

Rule Subchapter and Section: 310:2-29-5. Appeals, (a) Notice.

Comment: Ms. Houser wrote, "for clarity, it may be helpful to insert the phrase “to the applicant” after the word “notice” and before the words “to include the reasons....” in line 2 of the first paragraph of this section."

Response: The Department concurs in this recommendation and proposes the revision as shown below.

310:2-29-5. Appeals

(a) Notice. A determination by the Department that finds an applicant not eligible for employment will result in a notice to the applicant to include the reasons why the applicant is not eligible for employment and a statement that the applicant has a right to appeal the decision made by the Department regarding the employment eligibility. The notice shall also include information regarding where to file and describe the appellate procedures [63 O.S. § 1-1947(K)(2)].

Name & Organization: Regular Meeting of the Long-Term Care Facility Advisory Board; October 9, 2013.

LTCFAB members present: Kay Parsons, Chair; Dewey Sherbon, Vice Chair; Theo Crawley; Luke Tallant; Alan Mason; Wendell Short; Dustin Cox; Ivoria Holt; Linda Brannon; Donna Bowers; Diana Sturdevant; and Willie Burkhart.

Guests present: Mary Brinkley, Leading Age OK; Marilyn Kipps, guest; Jim Kipps; Gina Stafford, OK Board of Nursing; Oralene Sherbon, general public; Joyce Clark, Achievis; Marietta Lynch, Oklahoma Association of Health Care Providers; Wes Bledsoe, A Perfect Cause; Bill Whited, State Long Term Care Ombudsman's Office; Greg Frogge, McAfee Taft; Trish Ewing, State Council on Aging; Mark Stratton, University of Oklahoma Department of Pharmacy; Keith Swanson, guest; Gara Wilsie, Sequoia Health Services.

Rule Subchapter and Section: All

Comment: The Advisory Board was provided the Notice of Rulemaking Intent, Draft Rule Impact Statement and Proposed Rule. The members were advised the Department was collecting comment on the proposed schedule for implementation and that the Department anticipated revisions to the schedule to push back the initial effective date and extend the implementation period. A quorum of the Board was not present to allow a formal vote in support of the proposed rule. The members present expressed a consensus opinion in support of the rule and proposed no changes to the rule. Members were advised of the Public Comment Hearing to be held November 1, 2013, at which time they could provide individual written or oral comments.

Response: The Department appreciates the favorable review of the proposed rules. As discussed previously, the Department is proposing a revised schedule of effective dates allowing providers to begin submission as of February 1, 2014, but no later than the effective date proposed, which differs for the various provider and industry segments. The latest effective date will be August 1, 2014.

Name & Organization: Ad Hoc meeting of industry, state government and advocacy group representatives held at the Department October 30, 2013.

Rule Subchapter and Section: All

Present: Gayla Freeman, DHS Aging Services Division; Eleanor Kurtz, DHS Aging Services Division; Jonathan Vanbeber, DHS Aging Services Division; Melissa Holland and Patrick Gaines, Oklahoma Assisted Living Association; Lori Baer, Leading Age; Esther Houser, State Long Term Care Ombudsman, Department of Human Services; Joe Wolfe and Jennifer Buckles, First Call Home Care Agency; Avis Hill, Oklahoma Health Care Authority; Donna Bowers, Daily Living Center.

Comment: The Department provided the group the Notice of Rulemaking Intent, Draft Rule Impact Statement and Proposed Rule. Those present reviewed a proposed schedule of effective dates beginning February 1, 2014, and extending out over nine months. The benefits of deploying over the extended period of time, allowing gradual enrollment and time for training, were discussed as was concern about the availability of name based checks as a fallback if for some reason fingerprint collections could not be authorized. Also discussed was the concern of limiting the time grant dollars would be available to subsidize fingerprinting by delaying effective dates. The members present expressed support of the rule and implementing a fingerprint based national background check.

Response: The Department reviewed the proposed schedule and as discussed previously resolved to revise the schedule of effective dates allowing providers to begin submission as of February 1, 2014, but no later than the effective date proposed, which differs for the various provider and industry segments.

The program implementation budget includes funding for provider training to be held across the state. The total period of implementation is seven months, with the last effective date being August 1, 2014.

The Department concurs with the recommendation concerning an alternative use of a name based background check and proposes the language as shown below for section 310:2-29-3.

(d) **Alternate Name Based Background Check.** Where the Department is unable to authorize the collection and submission of fingerprints through an authorized collection site pursuant to Title 63 O.S. Section 1-1947(I), the Department shall conduct a name based search of the applicant in the criminal history database maintained by the Oklahoma State Bureau of Investigation.

Name & Organization: Micqueal Ware, Melinda Jones Thomason, Beverly Blake; Oklahoma Health Care Authority (OHCA); telephone calls, November 12 and 14th, 2013.

Comment: A discussion was held with these representatives of the OHCA regarding implementation of the program as it relates to the SoonerCare Nurse Aide Scholarship Program. Concern was expressed regarding the Nurse Aide Training Programs operating under the existing SoonerCare Nurse Aide Scholarship Program contracts. The concern related to the ability of the training programs to process applicants within the current contract and budget. Alternatives were discussed and it was proposed that the rule be modified to authorize a referral to the Department for registry screening and authorization to collect fingerprints where necessary and delaying the effective date for the SoonerCare Nurse Aide Scholarship Program requirements to coincide with contracts issued in the Fiscal Year beginning July 1, 2014.

Response: The Department concurs with the recommendation concerning the Nurse Aide Scholarship Program and proposes the language as shown below for section 310:2-29-3.

(b) **Effective dates.** The effective dates for subsections D through V of Section 1-1947 (relating to screening and fingerprint based background checks) are defined below.

.....
(7) For Nurse Aide Scholarship Programs operated under contract with the Oklahoma Health Care Authority, compliance may begin July 1, 2014, but shall be required no later than August 1, 2014.

.....
(c) **Nurse Aide Scholarship Programs.** For the purposes of complying with Title 63 O.S. Section 1-1947(G) (related to conducting a registry screening and criminal history record check), the Nurse Aide Scholarship Program may refer the applicant's application and release to the Department for registry screening and authorization to collect fingerprints.

Agency Rule Contact:

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