

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

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

Department of Human Services 407
Agency and Division Administrative Rules Chapter Number

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to become effective [**October 12, 2011**] through [**November 1, 2011**].
Date upon filing or later A maximum of 180 days including the effective date

RULE CAPTION

Addition of Potentially Disqualifying Abuse to Background Checks for DHS and OHA Providers

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

List each rule number separately, 000-000-0000.

Secure approval of new rule numbers (Adopted rules) with the Administrative Rules Unit prior to filing

AMEND: 407-007-0200, 407-007-0210, 407-007-0220, 407-007-0230, 407-007-0240, 407-007-0250, 407-007-0290, 407-007-0300, 407-007-0315, 407-007-0320, 407-007-0325, 407-007-0330, 407-007-0340, 407-007-0350

Stat. Auth.: **ORS 181.534, 181.537, 183.459, 409.025, 409.027, 409.050, 410.020, 411.060, 411.122, 418.016, 418.640, 441.055, 443.730, 443.735 & 678.153**

Other Auth.:

Stats. Implemented: **ORS 181.534, 181.537, 183.459, 409.010, 409.025, 409.027, 411.060, 411.122 & 443.004**

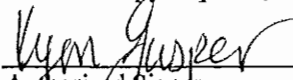
RULE SUMMARY

The Department of Human Services and the Oregon Health Authority are implementing ORS 409.027 which allows for the use of abuse investigations in determining a subject individual's fitness to provide care to vulnerable individuals. The use of certain abuse investigations where a subject individual is found to be responsible for the abuse as a potentially disqualifying condition shall be included in the background check process handled by the Background Check Unit. If a subject individual has potentially disqualifying abuse, only the Background Check Unit may make a final fitness determination.

Amendments to these rules also correct grammatical and stylistic errors, and clarify current processes. In addition, ORS 183.459 allowing the use of union representatives in contested case hearings for homecare workers is implemented.

Proposed rules are available on the DHS Website: <http://www.oregon.gov/DHS/admin/dwssrules/index.shtml>.

For hardcopy requests, call: (503) 947-5250.


Authorized Signer

Kym Gasper, Authorized Signer

Printed name

10/12/11

Date

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

STATEMENT OF NEED AND JUSTIFICATION

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

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

407

Administrative Rules Chapter Number

In the Matter of:

The temporary amendment of 407-007-0200, 407-007-0210, 407-007-0220, 407-007-0230, 407-007-0240, 407-007-0250, 407-007-0290, 407-007-0300, 407-007-0315, 407-007-0320, 407-007-0325, 407-007-0330, 407-007-0340, and 407-007-0350.

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

Addition of Potentially Disqualifying Abuse to Background Checks for DHS and OHA Providers

Statutory Authority: **ORS 181.534, 181.537, 183.459, 409.025, 409.027, 409.050, 410.020, 411.060, 411.122, 418.016, 418.640, 441.055, 443.730, 443.735 & 678.153**

Other Authority:

Stats. Implemented: **ORS 181.534, 181.537, 183.459, 409.010, 409.025, 409.027, 411.060, 411.122 & 443.004**

Need for the Temporary Rule(s):

In order to provide additional protection and safety for vulnerable individuals, the Department of Human Services and the Oregon Health Authority are implementing ORS 409.027 which allows for the use of abuse investigations in determining a subject individual's fitness to provide care to vulnerable individuals. The use of certain abuse investigations where a subject individual is found to be responsible for the abuse as a potentially disqualifying condition shall be included in the background check process handled by the Background Check Unit.

Documents Relied Upon, and where they are available:

None.

Justification of Temporary Rule(s):

Failure to immediately adopt these rules would prevent the Department from implementing ORS 409.027 as directed by the Legislative Assembly. Failure to act promptly will result in prejudice to the public interest and safety of Department clients and vulnerable persons. Adoption of these rules immediately will ensure the consideration of founded or substantiated abuse when determining the fitness of subject individuals providing care to vulnerable individuals. Such consideration shall substantially reduce the risk of potential harm and injury to the Department, its clients and vulnerable individuals.

Department efforts to confer with stakeholders and legal counsel regarding the need to protect Department clients and vulnerable persons from abusive behavior have resulted in an urgent need to proceed with a temporary rule at this time. The Department will simultaneously begin the permanent rulemaking process for this temporary rule with the express intent to continue the opportunity for public input while avoiding further delay in prompt implementation.



Authorized Signer

Kym Gasper, Authorized Signer

Printed name

10/12/11

Date

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

**DIVISION 7
CRIMINAL RECORDS AND ABUSE CHECK RULES**

Criminal Records Checks and Abuse Checks on Providers

407-007-0200

Purpose and Scope

- (1) The purpose of these rules, OAR 407-007-0200 to 407-007-0370, is to provide for the reasonable screening under ORS 181.534 ~~and~~, 181.537, and 409.027 of subject individuals to determine if they have a history of criminal or abusive behavior such that they should not be allowed to work, volunteer, be employed, reside, or otherwise perform in positions covered by these rules.
- (2) These rules apply to evaluating criminal records and potentially disqualifying conditions of a subject individual when conducting fitness determinations based upon such information. The fact that a subject individual is approved does not guarantee employment or placement. These rules do not apply to individuals subject to OAR 407-007-0000 to 407-007-0100.
- (3) Providers for the Department of Human Services (Department) and the Oregon Health Authority (Authority) are subject to background and abuse checks. The Authority authorizes the Department to act on its behalf in carrying out background and abuse checks associated with the administration of programs or activities administered by the Authority. References in these rules to the Department or the Authority shall be construed to be references to either or both agencies.

Stat. Auth.: ORS 181.534, 181.537, 183.459, 409.025, 409.027, 409.050, 410.020, 411.060, 411.122, 418.016, 418.640, 441.055, 443.730, 443.735 & 678.153

Stats. Implemented: ORS 181.534, 181.537, 183.459, 409.010, 409.025, 409.027, 411.060, 411.122; & 443.004

407-007-0210

Definitions

As used in OAR 407-007-0200 to 407-007-0370, unless the context of the rule requires otherwise, the following definitions apply:

- (1) ~~“Appointing authority” means the individual designated by the qualified entity responsible for appointing authorized designees and contact persons. Examples include but are not limited to human resources staff with the authority to offer and terminate~~

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employment, business owners, a member of the board of directors, a director, or a program administrator.

- (2) ~~“Approved” means, with regard to a fitness determination, that a subject individual, following a final fitness determination, is fit to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form.~~
- (3) ~~“Approved with restrictions” means an approval in which some restriction is made including but not limited to the subject individual, the subject individual’s environment, the type or number of clients for whom the subject individual may provide care, or the information to which the subject individual has access.~~
- (4) ~~“Authorized designee (AD)” means an individual designated by the Department of Human Services, or an approved qualified entity authorized by the Department of Human Services to receive and process criminal records check request forms from subject individuals and criminal records information from the Department of Human Services.~~
- (5) ~~“Background Check Unit (BCU)” means the Department of Human Services’ Background Check Unit.~~
- (6) ~~“Care” means the provision of care, treatment, education, training, instruction, supervision, placement services, recreation, or support to children, the elderly, or individuals with disabilities (see ORS 181.537).~~
- (7) ~~“Client” means any individual who receives services, care, or funding for care through the Department of Human Services.~~
- (8) ~~“Closed case” means a criminal records check application that has been closed without a final fitness determination.~~
- (9) ~~“Contact person (CP)” means an individual who is designated by the Department of Human Services or an approved qualified entity to receive and process criminal records check request forms from subject individuals, but who is not authorized to receive criminal records information from the Department of Human Services.~~
- (1) “Abuse” has the meaning given in the administrative rules promulgated by the Department of Human Services (Department) or Oregon Health Authority (Authority) corresponding to the setting in which the abuse was alleged or investigated.
- (2) “Abuse check” means obtaining and reviewing abuse allegations, abuse investigation reports, and associated exhibits and documents for the purpose of determining whether a subject individual has a history as a perpetrator of potentially disqualifying abuse (a potentially disqualifying condition) as described in OAR 407-007-0290(11).
- (3) “Abuse investigation report” means a written report completed after an investigation into suspected abuse and retained by the Department or the Authority pursuant to ORS

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- 124.085, 419B.030, or 430.757, or a similar report filed in another state agency or by another state.
- (4) “Appointing authority” means the individual designated by the qualified entity responsible for appointing authorized designees and contact persons. Examples include but are not limited to human resources staff with the authority to offer and terminate employment, business owners, a member of the board of directors, a director, or a program administrator.
- (5) “Approved” means, with regard to a fitness determination, that a subject individual, following a final fitness determination, is fit to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form.
- (6) “Approved with restrictions” means an approval in which some restriction is made including but not limited to the subject individual, the subject individual’s environment, the type or number of clients for whom the subject individual may provide care, or the information to which the subject individual has access.
- (7) “Authority” means the Oregon Health Authority.
- (8) “Authorized designee (AD)” means an individual designated by the Department, the Authority, or an approved qualified entity authorized by the Department or Authority to receive and process criminal records check request forms from subject individuals and criminal records information from the Background Check Unit. Only ADs employed by the Department or the Authority are authorized to receive abuse investigation reports, associated exhibits or documents from the Department or the Authority.
- (9) “Background check” means an abuse check and a criminal records check under these rules.
- (10) “Background Check Unit (BCU)” means the Background Check Unit, performing background checks for the Department.
- (11) “Care” means the provision of care, treatment, education, training, instruction, supervision, placement services, recreation, or support to children, the elderly, or individuals with disabilities (see ORS 181.537).
- (12) “Children, Adults and Families Division (CAF)” means the Department of Human Services, Children, Adults and Families Division.
- (13) “Client” means any individual who receives services, care, or funding for care through the Department or the Authority.
- (14) “Closed case” means a background check application that has been closed without a final fitness determination.

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- (15) “Contact person (CP)” means an individual who is designated by the Department, the Authority, or an approved qualified entity to receive and process criminal records check request forms from subject individuals, but who is not authorized to receive criminal records information or abuse investigation reports, associated exhibits or documents.
- (16) “Criminal records check” means obtaining and reviewing criminal records as required by these rules and includes any or all of the following:
- (a) An Oregon criminal records check where criminal offender information is obtained from the Oregon State Police (OSP) using the Law Enforcement Data System (LEDS). The Oregon criminal records check may also include a review of other criminal records information.
 - (b) A national criminal records check where records are obtained from the Federal Bureau of Investigation (FBI) through the use of fingerprint cards sent to OSP and other identifying information. The national criminal records check may also include a review of other criminal records information.
 - (c) A state-specific criminal records check where records are obtained from law enforcement agencies, courts, or other criminal records information resources located in, or regarding, a state or jurisdiction outside Oregon.
- ~~(17)~~ “Criminal offender information” means records, including fingerprints and photographs, received, compiled, and disseminated by OSP for purposes of identifying criminal offenders and alleged offenders and maintained as part of an individual’s records of arrest, the nature and disposition of criminal charges, sentencing, confinement, and release, but does not include the retention by OSP of records of transfer of inmates between penal institutions or other correctional facilities.. It also includes the OSP Computerized Criminal History System (see OAR 257-010-0015).
- ~~(18)~~ “Denied” means, with regard to a fitness determination, that a subject individual
- (a) Following a fitness determination including a weighing test, is not fit to work, volunteer, be employed, reside, or otherwise hold the position listed on the Background Check Request form.
 - (b) If determined to be a subject individual under OAR 407-007-0275, is not eligible to hold the position at or through the qualified entity listed on the Background Check Request form due to a conviction for one or more crimes listed in OAR 407-007-0275.
- ~~(19)~~ “Department” means the Department of Human Services, ~~the Oregon Health Authority,~~ or both.
- ~~(20)~~ “Fitness determination” means the decision in a case that is not closed, and includes:

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- (a) The decision regarding a Background Check Request form and preliminary review (a preliminary fitness determination); or
- (b) The decision regarding a Background Check Request form, completed ~~criminal records~~ background check, including gathering other information as necessary, and a final review by an AD (a final fitness determination).

(~~15~~21) “Founded or substantiated” has the meanings given in the Department’s administrative rules corresponding to the setting in which the abuse was alleged or investigated.

(~~22~~) “Good cause” means a valid and sufficient reason for not complying with time frames set during the ~~criminal records~~ background check process or contested case hearing process that includes but is not limited to an explanation of circumstances beyond a subject individual’s reasonable control.

(~~16~~23) “Hearing representative” means a Department employee representing the Department in a contested case hearing.

(~~17~~24) “Hired on a preliminary basis” means a condition in which a qualified entity allows a subject individual to work, volunteer, be trained, or reside in an environment following the submission of a completed Background Check Request form. Hired on a preliminary basis may also be called probationary status.

(~~18~~25) “Office of Investigation and Training (OIT)” means the Office of Investigation and Training of the Department.

(~~26~~) “Other criminal records information” means information obtained and used in the criminal records check process that is not criminal offender information from OSP. Other criminal records information includes but is not limited to police investigations and records, information from local or regional criminal records information systems, justice records, court records, information from the Oregon Judicial Information Network, sexual offender registration records, warrants, Oregon Department of Corrections records, Oregon Department of Transportation’s Driver and Motor Vehicle Services Division information, information provided on the Background Check Request forms, disclosures by a subject individual, and any other information from any jurisdiction obtained by or provided to the Department for the purpose of conducting a fitness determination.

(~~19~~27) “Position” means the position listed on the Background Check Request form which determines whether the individual is a subject individual under these or Department program rules.

(~~20~~28) “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 181.537).

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(21)29“Subject individual (SI)” means an individual on whom the Department may conduct an abuse check and a criminal records check, and from whom the Department 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 and who provides care.
 - (B) An employee, contractor, temporary worker, or volunteer who provides care, or has access to clients, client information, or client funds, within any entity or agency licensed, certified, registered, or otherwise regulated by the Department.
 - (C) Any individual who is paid directly or indirectly with public funds who has or will have contact with recipients of:
 - (i) Services within an adult foster home (defined in ORS 443.705);
 - (ii) Services within a residential facility (defined in ORS 443.400);
 - (iii) Services through in-home care agencies (defined on ORS 443.305); or
 - (iv) Services through home health agencies (defined in ORS 443.005).
 - (D) Any direct care staff secured by any residential care facility, assisted living facility, or nursing facility through the services of a personnel services or staffing agency who works in the facility.
 - (E) Except as excluded in section (21)(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, or boarder.
 - (F) An individual working or volunteering for a private licensed child caring agency or system of care contractor providing child welfare services pursuant to ORS chapter 418.
 - (G) A homecare worker as defined in ORS 410.600, personal care services provider, or an independent provider employed by a Department client who provides care to the client if the Department helps pay for the services.

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- (H) A child care provider and their employees reimbursed through the Department's child care program and other individuals in child care facilities that are exempt from certification or registration by the Child Care Division of the Oregon Employment Department (OED). This includes all individuals who reside in or who are frequent visitors to the residence or facility where the child care services are provided and who may have unsupervised access to the children (see OAR 461-165-0180).
 - (I) An AD or CP in any entity or agency licensed, certified, registered, otherwise regulated by the Department, or subject to these rules.
 - (J) An individual providing on the job certified nursing assistant classes to staff within a long term care facility.
 - (K) A student at a long term care facility enrolled in a certified nursing assistant class for employment at the facility.
 - (L) Any individual serving as an owner, operator, or manager of a room and board facility pursuant to OAR chapter 411, division 68.
 - (M) Any individual who is required to complete a criminal records check pursuant to other Department program rules or a contract with the Department or if the requirement is within Department's statutory authority. Specific statutory authority or reference to these rules and the positions under the contract subject to a criminal records check must be specified in the contract. This inclusion as a subject individual would not be negated by section (21)(b) of this rule.
- (b) An SI does not include:
- (A) Any individual under 16 years of age.
 - (B) An individual receiving training in a Department-licensed or Department-certified facility as part of the required curriculum through any college, university, or other training program and who is not an employee in the facility in which training is provided. The individual may not be considered a volunteer under these rules. Facilities must ensure that all students or interns have passed a substantially equivalent background check process through the training program or are:
 - (i) Actively supervised at all times as defined in OAR 407-007-0315; and
 - (ii) Not allowed to have unsupervised access to vulnerable individuals.

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- (C) Department clients or QE clients, unless specific written permission to conduct a criminal records check is received from the Department. The only circumstance in which the Department shall allow a check to be performed on a client pursuant to this paragraph is if the client falls within the definition of “subject individual” as listed in sections (21)(a)(A)-(D) and 21(a)(F)-(M) of this rule.
- (D) Individuals working in child care facilities certified or registered by the OED.
- (E) Individuals employed by a private business that provides services to clients and the general public and is not regulated by the Department.
- (F) 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 an environment regulated by the Department. The QE shall ensure active supervision of these individuals while on QE property and the QE may not allow unsupervised contact with QE clients or residents. This exclusion does not apply to a business that receives funds from the Department for care provided by an employee of the business.
- (G) Individuals employed by a private business in which a client of the Department is working as part of a Department-sponsored employment service program. This exclusion does not apply to an employee of a business that receives funds from the Department for care provided by the employee.
- (H) Employees and volunteers working in hospitals, ambulatory surgical centers, special inpatient care facilities, outpatient renal dialysis facilities, and freestanding birthing centers as defined in ORS 442.015.
- (I) Volunteers, who are not under the direction and control of any entity licensed, certified, registered, or otherwise regulated by the Department.
- (J) Individuals employed or volunteering in a Medicare-certified health care business which is not subject to licensure or certification by the State of Oregon.
- (K) Individuals working in restaurants or at public swimming pools.
- (L) Hemodialysis technicians.
- (M) Employees, contractors, temporary workers, or volunteers who provide care, or have access to clients, client information, or client funds of an alcohol and drug program that is certified, licensed, or approved by the

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Department's Addictions and Mental Health Division to provide prevention, evaluation, or treatment services. This exclusion does not apply to programs specifically required by other Department rules to conduct criminal records checks in accordance with these rules.

- (N) Individuals working for a transit service provider which conducts background checks pursuant to ORS 267.237.
- (O) Individuals being certified by the Department as interpreters pursuant to ORS 409.623. This exclusion does not apply to Department-certified interpreters when being considered for a specific position.
- (P) Provider group categories that were authorized for payment by the Department for care if the provider group categories were not covered by a Department criminal record check process prior to 2004.
- (Q) Emergency medical technicians and first responders certified by the Department'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 067.

(~~2230~~) "Weighing test" means a process in which one or more ADs consider available information to make a fitness determination when an SI has potentially disqualifying convictions or conditions.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537, 409.010, 409.027 & 443.004

407-007-0220

Criminal Records Background Check Required

- (1) The Department or a Department authorized QE shall conduct criminal records checks on all SIs through LEDS maintained by OSP in accordance with ORS chapter 181 and the rules adopted thereto (see OAR chapter 257, division 15).
- (2) If a national criminal records check of an SI is necessary, OSP shall provide the Department the results of national criminal records checks conducted pursuant to ORS 181.534, including fingerprint identification, through the FBI.
- (3) The Department shall conduct abuse checks on all SIs using available abuse investigation reports and associated documents.
- (4) An SI is required to have a background check in the following circumstances:

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- (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) Except as provided in section (45) of this rule, the individual, whether previously considered an SI or not, changes positions under the same QE, and the new position requires a criminal records background check.
 - (d) The individual, whether previously considered an SI or not, changes Department-issued licenses, certifications, or registrations, and the license, certification, or registration requires a criminal records background check under these rules.
 - (e) A criminal records background check is required by federal or state laws or regulations, other Department administrative rules, or by contract with the Department.
 - (f) When the Department or the AD has reason to believe that a criminal records background check is justified. Examples include but are not limited to any indication of possible criminal or abusive behavior by an SI or quality assurance monitoring of a previously conducted criminal records check or abuse check.
- (45) A criminal records background check is not required under the following circumstances:
- (a) A personal care services provider, Lifespan Respite care provider, or an independent provider paid with Department funds who changes or adds clients, and the prior, documented criminal records check or abuse check conducted within the previous 24 months through the Department has been approved without restrictions.
 - (b) The SI is a child care provider as described in OAR 461-165-0180 who has been approved without restrictions and who changes or adds clients.
 - (c) The SI remains with a QE in the same position listed on the Background Check Request Form while the QE merges with another QE, is sold to another QE, or changes names. The changes may be noted in documentation attached to the notice of fitness determination but do not warrant a new criminal records background check.
- (56) An AD must document in writing the reason why a new criminal records background check was not completed.
- ~~(6) Criminal records~~ (7) Background checks are completed on SIs who otherwise meet the qualifications of the position in question listed on the Background Check Request Form. A criminal records background check may not be used to screen applicants for a position.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537-~~2~~, 409.010, 409.027 & 443.004

407-007-0230

Qualified Entities

- (1) A QE and its appointing authorities must be approved in writing by the Department pursuant to these rules in order to appoint an AD or CP. Unless specifically indicated otherwise in these rules, all QEs and appointing authorities discussed in these rules are considered approved.
- (2) Except as provided in section (3) of this rule, all QEs shall ensure the completion of ~~criminal records~~background checks for SIs who are the QE's employees, volunteers, or other SIs under the direction or control of the QE.
 - (a) The QE's appointing authority shall appoint ADs or CPs within 30 calendar days following Department approval, or within time frames required by Department program offices.
 - (b) Unless specifically allowed by the Department, an appointing authority may not appoint themselves as an AD.
 - (c) Appointing authorities in all QEs shall appoint one or more ADs, or have a written agreement with another QE to handle AD responsibilities.
 - (d) Appointing authorities in all QEs may also appoint one or more CPs, or may have a written agreement with another QE to perform CP responsibilities.
- (3) The Department's appointing authorities shall appoint ADs and CPs within the Department. Department-employed ADs shall make fitness determinations for the following QEs:
 - (a) Private QEs with fewer than 10 employed SIs are not eligible to appoint ADs. These QEs shall do one of the following:
 - (A) Use another QE to perform AD responsibilities instead of using the Department. If another QE is used, the two QEs must have a written agreement. The QE must provide the Department with a copy of the agreement.
 - (B) Appoint one or more CPs, or have a written agreement with another QE to perform CP responsibilities. The QE must provide the Department with a copy of the agreement.
 - (b) QEs with SIs not under the direction and control of the QE but who provide care under programs administered by the QE may have the Department ADs make fitness determinations.

- (A) The QE shall appoint one or more CPs, or use an AD or CP appointed under section (2) of this rule to perform CP responsibilities.
 - (B) The QE may appoint an AD for SIs not under the direction and control of the QE if the QE chooses to do so or is required to do so under other Department program rules or contract with the Department. The QE shall notify the Department in writing which programs are affected and which AD shall perform the responsibilities for each program.
- (c) QEs may have specific direction by administrative rule or Department program about AD or CP appointments.
- (A) Administrative rules governing certain QEs may prohibit AD appointment or CP appointment, such as private licensed child caring agencies.
 - (B) Department program offices may determine that:
 - (i) Certain QEs may not have their own ADs or CPs, but must use ADs or CPs at a local Department branch or a local QE. Examples include but are not limited to adult foster homes and child foster homes.
 - (ii) Specific QEs may have specific AD or CP requirements resulting from licensing actions, sanctions, or from quality assurance monitoring.
- (d) The Department may require certain QEs to use Department-employed ADs to make fitness determinations. Examples include but are not limited to initial opening of a new QE, newly adopted administrative rules creating a new type of QE, or Department investigation or review of the QE.
- (4) The Department may revoke approval of the QE to appoint or maintain ADs if the Department is investigating a compliance issue or determines that the QE, or an AD or CP appointed by the QE, has failed to comply with these rules. The BCU and the appropriate entity or program office within the Department may develop a plan of action to resolve the compliance issues.
- (5) The QE's appointing authorities shall appoint ADs and CPs as needed to remain in compliance with these rules. If a QE no longer has an AD or CP for any reason, the appointing authorities shall ensure that new ADs or CPs are appointed within 30 calendar days from the date of no longer having ADs or CPs, and shall communicate any changes to the BCU.
- (6) The Department shall provide QEs with periodic training and on-going technical assistance.

- (7) Any decisions made by the Department in regard to these rules are final and may not be overturned by any QE, its ADs or CPs.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537, 409.010, 409.027 & 443.004

407-007-0240

Authorized Designees and Contact Persons

- (1) All requirements in this section must be completed within 90 calendar days. To receive Department approval, all ADs and CPs must meet the following requirements:
- (a) ADs and CPs for the Department must be employed by the Department. For QEs, the ADs and CPs must be one of the following:
 - (A) Employed by the agency for which they will handle criminal records check information.
 - (B) Contracted with the QE to perform as an AD or CP.
 - (C) Employed by another similar QE or a parent QE (e.g., assisted living facility AD helping another assisted living facility).
 - (b) ADs and CPs shall complete a certification program and successfully pass any testing as required by the Department.
 - (c) An appointing authority shall appoint an AD or CP in writing on a form provided by the Department. The applicant AD or CP shall complete and submit the form to the Department for processing and registration.
 - (d) The Department shall conduct an abuse check, an Oregon criminal records check, a national criminal records check, and if necessary, a state-specific criminal records check. The AD or CP must have:
 - (A) No conviction for a potentially disqualifying permanent review crime;
 - (B) No convictions for any other crime in the past 15 years;
 - (C) No potentially disqualifying conditions; and
 - (D) If an AD, Criminal Justice Information Systems (CJIS) clearance and approval to view criminal records in accordance with OSP rules.
 - ~~(e) The Department shall conduct an abuse check if Department program rules require an abuse check on SIs and E)~~ With consideration of OAR

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407-007-0290(11), no determination that the BCU has the authority to conduct the abuse check. The AD or CP may not have been was found responsible for potentially disqualifying abuse of a vulnerable person.

- (2) The Department shall deny the individual's status as an AD or CP if the individual does not meet the AD or CP requirements. Once denied, the individual may no longer perform the duties of an AD or CP. There are no exceptions for individuals who do not meet the AD or CP requirements.
- (3) Approved ADs and CPs shall have the following responsibilities:
- (a) Demonstrate understanding of and adherence to these rules in all actions pertaining to the criminal records background check process.
 - (b) Act as the Department's designee in any action pursuant to these rules and the criminal records background check process. The AD or CP may not advocate for an SI during any part of the criminal records background check process, including contesting a fitness determination.
 - (c) Ensure that adequate measures are taken to protect the confidentiality of the records and documents required by these rules. Only an AD may view criminal offender information. A CP may not view criminal offender information. The AD and CP may not view abuse investigation reports and associated abuse investigation exhibits or documents as part of the background check process.
 - (d) Verify the identity of an SI. The AD or CP shall verify identity or ensure that the same verification requirements are understood by each individual responsible for verifying identity.
 - (A) If conducting a criminal records background check on the SI for the first time or at rehire of the SI, the AD or CP shall verify identity by using methods which include but are not limited to asking the SI for current and valid government-issued photo identification and confirming the information on the photo identification with the SI, the information written on the Background Check Request form, and the information written on the fingerprint card if a national criminal records check is conducted.
 - (B) If an AD or CP is verifying the identity of an SI who is being rechecked, review of government-issued photo identification may not be necessary, but the AD or CP shall verify the SI's name, current address, and any aliases or previous names.
 - (e) Ensure that an SI is not permitted to work, volunteer, reside, or otherwise hold any position covered by these rules before the completion of a preliminary fitness determination and submission of the Background Check Request form to the

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Department along with a fingerprint card if the SI discloses out of state criminal records or residency.

- (f) Ensure that when an SI is hired on a preliminary basis, the need for active supervision is understood by each individual responsible for providing active supervision.
- (g) Ensure that if an SI is removed from working on a preliminary basis, the SI is immediately removed from the position and remains removed until the completion of a final fitness determination or unless the BCU reinstates hired on a preliminary basis.
- (h) Notify the Department of any changes regarding an SI who still has a ~~criminal records~~background check being processed, including but not limited to address or employment status changes.
- (i) Monitor the status of ~~criminal records~~background check applications and investigate any delays in processing.
- (j) Ensure that documentation required by these rules is processed and maintained in accordance with these rules.
- (k) Notify the BCU immediately if arrested, charged, or convicted of any crime.
- ~~(4) A CP may not conduct final fitness determinations, or review criminal offender information if found responsible for abuse by the Department.~~
- (4) A CP may not conduct final fitness determinations. A CP has the following limitations when making preliminary fitness determinations:
 - (a) The CP may review the SIs completed Background Check Request form to ensure completeness of the form, verify identity, and to determine if the SI has any potentially disqualifying convictions or conditions.
 - (b) The CP may allow the SI to be hired on a preliminary basis only after the CP has reviewed the Background Check Request form and determined there is no indication that the SI has any potentially disqualifying convictions under OAR 407-007-0280 or conditions under OAR 407-007-0290.
 - (c) The CP shall not allow an SI who discloses any potentially disqualifying convictions or conditions to work on a preliminary basis.
 - (d) If the SI discloses potentially disqualifying convictions or conditions, the CP shall forward the Background Check Request form to an AD for preliminary fitness determination, or to the BCU for processing if there is no local AD available.

- (5) In addition to the responsibilities listed in section (3) of this rule, the AD shall:
- (a) Review the completed Background Check Request form (if not already done so by a CP) and conduct a preliminary fitness determination to determine eligibility for probationary status before forwarding the Background Check Request form to the BCU.
 - (b) Make a final fitness determination on all SIs when the Department returns their Background Check Request form to the AD for final review. The decision of an AD may not be overruled by an employee, owner, or board member of a QE who is not an AD.
 - (c) Participate in the appeal process if requested by the Department.
 - (d) Ensure the confidentiality and integrity of criminal records check documents. After the completion of a ~~criminal records~~background check, ADs not involved with original fitness determinations may not review criminal records check documents to gain information on an SI's criminal history unless a new background check is being conducted. If a review is necessary, the AD must have written approval from the Department prior to reviewing any documents.
- (6) An AD may not have access to criminal offender information, other criminal information (except the Background Check Request form), or make a fitness determination if there is a conflict of interest between the AD and the SI.
- (a) A conflict of interest includes but is not limited to the following situations:
 - (A) If the AD is related to the SI. In this context, "related" means spouse, domestic partner, natural parent, child, sibling, adopted child, adopted parent, stepparent, stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, grandparent, grandchild, aunt, uncle, niece, nephew, or cousin.
 - (B) If the AD has a close personal or financial relationship, other than an employee-employer relationship, with the SI.
 - (b) When there is a conflict of interest and the QE has no other ADs available to conduct the fitness determination, the Department shall complete the fitness determination.
- (7) The Department may change AD or CP status in the following circumstances which include but are not limited to:
- (a) The Department shall inactivate AD or CP status when the AD or CP position with the QE ends or when the QE terminates the appointment. The QE shall

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notify the Department immediately upon the end of the position or termination of the appointment.

- (b) The Department or QE shall suspend or revoke the appointment if an AD or CP fails to comply with responsibilities or fails to continue to meet the requirements for AD or CP, as applicable. After suspending or revoking the appointment, the QE must immediately notify the BCU in writing. If the Department takes the action, it must immediately notify the QE in writing.
- (c) The Department shall revoke AD or CP status if an AD or CP fails to recertify.
- (8) Any changes to AD or CP status are not subject to appeal rights unless the denial or termination results in immediate loss of employment or position. ADs or CPs losing employment or position have the same hearing rights as other SIs under these rules.
- (9) If an AD or CP leaves employment with the QE for any reason, the Department shall inactivate AD or CP status. If the individual finds employment with another QE, a new appointment, application, and registration must be completed.
- (10) The Department shall review and recertify appointments of ADs and CPs, up to and including a new application, criminal records background check, ~~abuse check if required~~, and additional training, ~~to~~ under the following circumstances:
 - (a) Every three years; or
 - (b) Any time the Department has reason to believe the individual no longer meets the AD or CP requirements including but not limited to indication of criminal or abusive behavior or indication of noncompliance with these rules.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537-~~2~~, 409.010, 409.027 & 443.004

407-007-0250

Criminal Records Background Check Process

- (1) A QE and SI shall use the Background Check Request form to request a ~~criminal records background check that must~~ criminal records background check which shall include the following information:
 - (a) Name and aliases;
 - (b) Date of birth;
 - (c) Address and recent residency information;
 - (d) Driver license or identification card information;

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- (e) Position the SI is completing the Background Check Request form;
 - (f) Disclosure of all criminal history;
 - (A) The SI must disclose all arrests, charges, and convictions regardless of outcome or when the arrests, charges, or convictions occurred.
 - (B) The disclosed crimes and the dates must reasonably match the SI's criminal offender information and other criminal records information, as determined by the Department.
 - (g) Disclosure of other information to be considered in the event of a weighing test.
- (2) The Background Check Request form shall include the following notices:
- (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 solely for the purpose of positively identifying the SI during the criminal records check process.
 - (b) A notice that the SI may be subject to fingerprinting as part of a criminal records check.
 - (c) A notice that the BCU shall conduct an abuse check on the SI. The SI is not required to disclose any history of potentially disqualifying abuse, but may provide the BCU with mitigating or other information.
- (3) The BCU shall review each Background Check Request form received for completeness and timeliness. If the BCU rejects the form, the QE's AD or CP shall immediately remove the SI from the position. If the QE still plans to hire the SI, the QE shall resolve the reasons for rejection and re-submit the form.
- ~~(4) The Department or an approved QE under contract with OSP for LEDS access shall conduct an-~~ (4) Using identifying information submitted on the Department's Background Check Request form, the Department shall conduct an abuse check to determine if the subject individual has potentially disqualifying abuse.
- (5) The Department shall conduct an Oregon criminal records check after a completed Background Check Request form is received. Using information submitted on the Background Check Request form, the Department or QE may obtain criminal offender information from LEDS and may request other criminal records information as needed.

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- | (56) The Department and all QEs receiving LEDS information shall handle criminal offender information in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).

- | (67) The Department may conduct a fingerprint-based national criminal records check after an Oregon criminal records check has been completed.
 - (a) A fingerprint-based national criminal records check may be completed under any of the following circumstances:
 - (A) The SI has been outside Oregon:
 - (i) For 60 or more consecutive days during the previous 18 months and the SI is a child care provider or other individual included in OAR 461-165-0180.
 - (ii) For 60 or more consecutive days during the previous five years for all other SIs.
 - (B) The LEDS check, SI disclosures, or any other criminal records information obtained by the Department indicate there may be criminal records outside of Oregon.
 - | (C) The SI has an out-of-state driver license or out-of-state identification card.
 - (D) The Department has reason to question the identity or criminal record of the SI.
 - (E) A fingerprint-based criminal records check is required by federal or state laws or regulations, other Department rules, or by contract with the Department.
 - (F) The SI is an AD or CP.
 - (G) The Department has reason to believe that fingerprints are needed to make a final fitness determination.
 - (b) The Department must receive consent from the parent or guardian to obtain fingerprints from an SI under 18 years of age.
 - (c) The SI shall complete and submit a fingerprint card when requested by the Department. The Department shall send the request to the QE and the AD or CP shall notify the SI.

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- (A) The SI shall use a fingerprint card provided by the Department. The Department shall give the SI notice regarding the Social Security number as set forth in OAR 407-007-0250(2)(a).
- (B) The SI shall submit the fingerprint card to the BCU within 21 calendar days of the request.
 - (i) The Department shall close the application, making it a closed case, if the fingerprint card is not received within 21 calendar days. When a case is closed, the SI may not be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules, and shall be immediately terminated and removed from the position.
 - (ii) The Department may extend the time allowed for good cause provided by the SI or QE.
- (C) The Department may require new fingerprint cards if previous cards are rejected by OSP or the FBI.

| (78) The Department may also conduct a state-specific criminal records check instead of or in addition to a national criminal records check. Reasons for a state-specific criminal records check include but are not limited to:

- (a) When the Department has reason to believe that out-of-state criminal records may exist and a national criminal records check may not be accomplished.
- (b) When the Department 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, the Department has reason to believe that a state-specific criminal records check is necessary.

| (89) In order to complete a ~~criminal records background~~ check and fitness determination, the Department may require additional information from the SI including but not limited to additional criminal, judicial, other background information, or proof of identity.

| (910) The Department may conduct a ~~criminal records background~~ check in situations of imminent danger.

(a) If the Department determines there is indication of criminal or abusive behavior that could more likely than not pose an immediate risk to vulnerable individuals, the Department shall conduct a new criminal records check on an SI without the completion of a new Background Check Request form.

(b) If the Department determines that a fitness determination based on the new ~~criminal records~~background check would be adverse to the SI, the Department shall provide the SI, if available, the opportunity to disclose criminal records, potentially disqualifying conditions, and other information as indicated in OAR 407-007-0300 before the completion of the fitness determination.

(4011) All criminal records checks conducted under this rule shall be documented in writing.

Stat. Auth.: ORS 181.537, ~~409.027~~ & 409.050

Stats. Implemented: ORS 181.534, 181.537-~~&~~, 409.010, ~~409.027~~ & 443.004

407-007-0290

Other Potentially Disqualifying Conditions

The following are potentially disqualifying conditions:

- (1) The SI makes a false statement to the QE, AD, or Department, including the provision of materially false information, false information regarding criminal records, or failure to disclose information regarding criminal records. Nondisclosure of violation or infraction charges may not be considered a false statement.
- (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 a predatory sex offender in any jurisdiction under ORS 181.585 or found to be a sexually violent dangerous offender under ORS 144.635 (or similar statutes in other jurisdictions).
- (3) The SI has an outstanding warrant for any crime in any jurisdiction.
- (4) The SI has a deferred sentence, conditional discharge, or is participating in a diversion program in any jurisdiction for any potentially disqualifying crime.
- (5) The SI is currently on probation, parole, or post-prison supervision for any crime in any jurisdiction, regardless of the original conviction date (or date of guilty or no contest plea if there is no conviction date).
- (6) The SI has been found in violation of post-prison supervision, parole, or probation for any crime in any jurisdiction, regardless of the original conviction date (or date of guilty or no contest plea if there is no conviction date), within five years from the date the Background Check Request form was signed or the date the Department conducted a criminal records check due to imminent danger.

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- (7) The SI has an unresolved arrest, charge, or a pending indictment for any crime in any jurisdiction.
- (8) The SI has been arrested in any jurisdiction as a fugitive from another state or a fugitive from justice, regardless of the date of arrest.
- (9) The SI has an adjudication in a juvenile court in any jurisdiction, finding that the SI was responsible for a potentially disqualifying crime that would result in a conviction if committed by an adult. Subsequent adverse rulings from a juvenile court, such as probation violations, shall also be considered potentially disqualifying if within five years from the date the Background Check Request form was signed or the date the Department conducted a criminal records check due to imminent danger.
- (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 potentially disqualifying crime, unless the local statutes indicate that such an outcome is considered an acquittal.
- (11) ~~Child protective services~~ Potentially disqualifying abuse as determined from abuse investigation reports that which have a-an outcome of founded, substantiated, or valid and in which the SI is determined to have been responsible for the abuse. This potentially disqualifying condition only applies when:
- (a) ~~The Department administrative rules specifically require a protective services background check as part of the application process including but not limited to child foster homes, adoptive families, licensed private child caring agencies, or child care providers; and~~ (a) For SIs associated with child foster homes licensed through the Department’s Seniors and People with Disabilities Division, child foster homes licensed through a private licensed child caring agency or adoptive families through an private licensed child caring agency, potentially disqualifying abuse includes:
- (b) ~~The BCU has the authority to conduct an abuse check.~~
- (A) Child protective services history held by the Department regardless of the date of initial report or outcome;
- (B) Child protective services history reviewed pursuant to the federal Adam Walsh Act requirements, determined by BCU ADs to be potentially disqualifying; and
- (C) Adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to

BCU by the Office of Investigation and Training and the Seniors and People with Disabilities Division based on severity.

- (b) For staff and volunteers of a private licensed child caring agency:
 - (A) Child protective services history held by the Department regardless of the date of initial report or outcome; and
 - (B) Adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by the Office of Investigation and Training and the Seniors and People with Disabilities Division based on severity.

- (c) For child care providers and associated subject individuals defined in OAR 407-007-0210(29)(a)(H):
 - (A) Child protective services history held by the Department regardless of the date of initial report, date of outcome and considered potentially disqualifying pursuant to OAR 461-165-0420; and
 - (B) Adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by the Office of Investigation and Training and the Seniors and People with Disabilities Division based on severity.

- (d) For all other SIs, potentially disqualifying abuse includes founded or substantiated adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to the BCU by the Office of Investigation and Training and the Seniors and People with Disabilities Division based on severity.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537-~~&~~, 409.010, 409.027 & 443.004

407-007-0300
Weighing Test

When making a fitness determination, the AD shall consider any of the following factors if an SI has potentially disqualifying convictions or conditions as disclosed by the SI or which is otherwise known:

- (1) Circumstances regarding the nature of potentially disqualifying convictions and conditions including but not limited to:
 - (a) The details of incidents leading to the charges of potentially disqualifying convictions or resulting in potentially disqualifying conditions.

- (b) Age of the SI at time of the potentially disqualifying convictions or conditions.
- (c) Facts that support the convictions or potentially disqualifying conditions.
- (d) Passage of time since commission of the potentially disqualifying convictions or conditions.
- (e) Consideration of state or federal laws, regulations, or rules covering the position, facility, employer, or QE regarding the potentially disqualifying convictions or conditions.

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

- (a) Circumstances leading to the incident of abuse;
- (b) The nature and type of abuse; and
- (c) Other information gathered during the scope of the abuse investigation.
- (d) The date of the abuse incident and abuse investigation, and the age of the SI at the time of the abuse.
- (e) The quality of the abuse investigation including, if applicable, any exhibits and related documents with consideration taken into account regarding completeness, objectivity, and sufficiency.
- (f) Due process provided to the SI after the abuse investigation.
- (g) Required action resulting from the founded or substantiated abuse including but not limited to training, counseling, corrective or disciplinary action, and the SI's compliance.

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

- (a) Other information related to criminal activity including charges, arrests, pending indictments, and convictions. Other behavior involving contact with law enforcement may also be reviewed if information is relevant to other criminal records or shows a pattern relevant to criminal history.
- (b) Periods of incarceration.
- (c) Status of and compliance with parole, post-prison supervision, or probation.
- (d) Evidence of alcohol or drug issues directly related to criminal activity or potentially disqualifying conditions.

- (e) Evidence of other treatment or rehabilitation related to criminal activity or potentially disqualifying conditions.
- (f) Likelihood of repetition of criminal behavior or behaviors leading to potentially disqualifying conditions, including but not limited to patterns of criminal activity or behavior.
- (g) Information from the Department's protective services, abuse or other investigations in which the investigator documented behavior or conduct by the ~~subject individual~~ SI that would pose a risk to or jeopardize the safety of vulnerable individuals.
- (h) Changes in circumstances subsequent to the criminal activity or disqualifying conditions including but not limited to:
 - (A) History of high school, college, or other education related accomplishments.
 - (B) Work history (employee or volunteer).
 - (C) History regarding licensure, certification, or training for licensure or certification.
 - (D) Written recommendations from current or past employers, including Department client employers.
- (i) Indication of the SI's cooperation, honesty, or the making of a false statement during the criminal records check process, including acknowledgment and acceptance of responsibility of criminal activity and potentially disqualifying conditions.

(34) The AD shall consider the relevancy of the SI's criminal activity or potentially disqualifying conditions to the paid or volunteer position, or to the environment in which the SI will reside, work, or visit.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537-~~6~~, 409.010, 409.027 & 443.004

407-007-0315

Hired on a Preliminary Basis

A preliminary fitness determination is required to determine if an SI may work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form prior to a final fitness determination. The SI may not be hired on a preliminary basis prior to the completion of a preliminary fitness determination.

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- (1) The SI must complete required information on a Background Check Request form and the AD or CP must review the form.
- (2) The AD or CP shall review the Background Check Request form, complete a preliminary fitness determination and shall then make one of the following determinations
 - (a) An SI may be hired on a preliminary basis, only during the period of time prior to a final fitness determination, into the position listed on the Background Check Request form and be allowed to participate in training, orientation, and position activities under the one of the following circumstances:
 - (A) If there is no indication of a potentially disqualifying conviction or condition on the Background Check Request form and the AD or CP have no reason to believe the SI has potentially disqualifying history. This is the only situation in which a CP may hire an SI on a preliminary basis.
 - (B) If the SI discloses any potentially disqualifying convictions or conditions, the SI may be hired on a preliminary basis only after the completion of a weighing test by an AD. The SI may be hired on a preliminary basis only if, based on information available at the time, the AD determines that more likely than not that the SI poses no potential threat to vulnerable individuals.
 - (b) The QE may not hire a SI on a preliminary basis under any of the following circumstances:
 - (A) Being hired on a preliminary basis or probationary status is not allowed by program rules.
 - (B) The SI has disclosed potentially disqualifying convictions or conditions and the QE does not have an AD to make a preliminary fitness determination.
 - (C) The AD or Department determine that:
 - (i) More likely than not, the SI poses a potential threat to vulnerable individuals, based on a preliminary fitness determination and weighing test;
 - (ii) The SI's most recent ~~criminal records~~background check under these rules or other Department criminal records check rules or abuse check rules resulted in a denial; or

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- (iii) The SI is currently involved in contesting a ~~criminal records~~background check under these or other Department criminal records check rules or abuse check rules.
 - (D) An outcome of no hiring on a preliminary basis may only be overturned by the Department.
- (3) The QE shall forward the Background Check Request form to the Department immediately upon completion of the preliminary fitness determination or, if the QE cannot make a preliminary fitness determination, immediately after the SI's completion of the form and verification of the SIs identity.
- (4) The Department shall review the preliminary fitness determination made by the QE.
 - (a) The Department may change the outcome of the preliminary fitness determination based on available information.
 - (b) A QE without access to an AD may request the Department make a preliminary fitness determination if the SI discloses potentially disqualifying convictions or conditions.
- (5) An SI hired on a preliminary basis shall be actively supervised at all times.
 - (a) The individual providing active supervision at all times shall do the following:
 - (A) Be in the same building as the SI or, if outdoors of QE buildings or any location off the QE property, be within line-of-sight and hearing, except as provided in section (65)(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) ~~A subject individual~~An SI who has been approved without restrictions pursuant to these rules or previous Department criminal records check rules; or
 - (B) The adult client, an adult client's adult relation, the client's legal representative, or a child's parent or guardian. Active supervision by these individuals is appropriate in situations where care is given directly to clients usually in a home such as but not limited to in-home care, home health, or care by home care workers, personal care assistants, or child care providers.

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- (i) The adult client may actively supervise a homemaker, 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 AD, or the private-pay client receiving services through an in-home care or home health agency.
 - (ii) A child client's parent or guardian shall be responsible for providing active supervision in the case of child care providers. The supervision is not required to be performed by someone in the same building as the child.
- (6) 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 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. This 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 criminal activity or potentially disqualifying abuse within the previous 24 months.
 - (c) If, as determined by the AD or the Department, the job duties in the new position are so substantially different from the previous position that the previous fitness determination is inadequate for the current position.
- (7) Revocation of hired on a preliminary basis is not subject to hearing or appeal. The QE or the Department may immediately revoke hired on a preliminary basis for any of the following reasons:
 - (a) There is any indication of falsification of application.
 - (b) The QE or Department determines that allowing the SI to be hired on a preliminary basis is not appropriate, based on the application, criminal record, position duties, or Department program rules.
- (8) 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 form prior to a final fitness determination.

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

Stat. Auth.: ORS 181.537, ~~409.027~~ & 409.050

Stats. Implemented: ORS 181.534, 181.537-~~8~~, 409.010, ~~409.027~~ & 443.004

407-007-0320

Final Fitness Determinations

The AD shall make a final fitness determination after all necessary ~~criminal records~~background checks have been received and a weighing test, if necessary, has been completed. The AD may obtain and consider additional information as necessary to complete the final fitness determination.

- (1) The final fitness determination results in one of the following outcomes:
- (a) The AD 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 AD determines that more likely than not that the SI poses no risk to the physical, emotional, or financial well-being of vulnerable individuals.
 - (b) The AD may approve an SI with restrictions if the AD determines that more likely than not that 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 ~~criminal records~~background check and fitness determination shall be completed on the SI before removing a restriction.
 - (c) The AD shall deny an SI whom the AD determines, after a weighing test, more likely than not poses a risk to the physical, emotional, or financial well-being of vulnerable individuals.
- (2) The Department shall make a final fitness determination in the following situations:
- (a) A national or state-specific criminal records check has been completed on the SI;
 - (b) The Department determines that the SI has potentially disqualifying abuse as described in OAR 407-007-0290(11).
 - (c) If Oregon laws or program administrative rules governing the QE or the position require that the Department makes the final fitness determination;

- (~~ed~~) The SI has the following history regarding criminal records checks or abuse checks:
 - (A) The SI's most recent criminal records check or abuse check under these rules or other Department ~~criminal records check~~-rules resulted in a denial; or
 - (B) The SI's most recent criminal records check or abuse check under these or other Department ~~criminal records check~~-rules required a weighing test which was completed by the Department.
 - (~~de~~) If, after conducting a criminal records check or abuse check, the Department determines that, based on the presence of a potentially disqualifying crime or condition, there is a potential for imminent danger to vulnerable individuals;
 - (~~ef~~) If the QE requests the Department to make the final fitness determination because the QE is temporarily unable to provide an AD to conduct a fitness determination;
 - (~~fg~~) Upon request of an AD, the Department may provide technical assistance or make the final fitness determination;
 - (~~gh~~) If the Department has reason to believe a final fitness determination has not been conducted in compliance with these rules, the Department may repeat the ~~criminal records~~ background check and make a final fitness determination; or
 - (~~hi~~) If the QE or AD is under investigation regarding compliance with these rules and the status of all ADs have been suspended during the investigation.
- (3) The Department may review final fitness determinations made by local ADs and make a new final fitness determination at its discretion.
- (4) Upon completion of a final fitness determination, the Department or AD making the decision shall provide written notice to the SI.
- (a) The notice shall be in a Department-approved format.
 - (b) If approved, the Background Check Request form shall indicate the final fitness determination and the completed Background Check Request form shall be the notice of fitness determination.
 - (A) If the final fitness determination is completed by the Department, the QE shall ensure that the SI receives a copy of the Background Check Request form after the Department returns the Background Check Request form to the QE.

- (B) If the final fitness determination is completed by the local AD, the local AD shall ensure that the SI receives a copy of the Background Check Request form after the AD completes the Background Check Request form.
- (c) If denied or approved with restrictions, the notice of fitness determination shall include 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.
 - (A) If the final fitness determination is completed by the Department, the Department shall ensure that the SI receives a copy of the notice of fitness determination and the Background Check Request form. The Department shall provide the QE with a copy of the Background Check Request form to the QE with indication of the final fitness determination being either denied or approved with restrictions.
 - (B) If the final fitness determination is completed by the local AD, the local AD shall ensure that the SI receives a copy of the notice of fitness determination and the Background Check Request form after the AD completes the Background Check Request form.
- (d) The notice shall be mailed or hand-delivered to the SI within 14 calendar days after the final fitness determination has been completed. The effective date of action shall be recorded on the notice.
- (5) When an SI is denied, the SI shall not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form. A denial applies only to the position and application in question. A denial 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 form 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) Final fitness determinations must be documented in writing, including any details including but not limited to the potentially disqualifying convictions or conditions, the factors considered during weighing test, and restrictions in a restricted approval. The authorized designee shall also maintain any documents obtained during the fitness determination, such as written statements and certificates from the subject individual, police reports, or court records.

- (8) The Department or AD shall make new fitness determinations for each application. The outcome of previous fitness determinations does not set a precedent for subsequent fitness determinations.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537-&, 409.010, 409.027 & 443.004

407-007-0325

Closed Case

If the SI discontinues the application or fails to cooperate with the criminal records check or fitness determination process, the application is considered incomplete and may be closed.

- (1) Discontinuance or failure to cooperate includes but is not limited to the following circumstances:
- (a) The SI fails to disclose all criminal history on the Background Check Request form.
 - (b) The SI refuses to be fingerprinted when required by these rules.
 - (c) The SI fails to respond within a stated time period to a request for corrections to the application, fingerprints, or any other information necessary to conduct a criminal records check or an abuse check and there is not enough information available to make a fitness determination.
 - (d) The SI withdraws the application, leaves the position prior to completion of the ~~criminal records~~background check, or the Department cannot locate or contact the subject individual.
 - (e) The SI is determined to be ineligible for the position for reasons other than the ~~criminal records~~background check.
- (2) When the application is closed without a final fitness determination, the SI does not have a right to contest the closure.
- (3) When a case is closed, the SI shall not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form. A closed case applies only to the position in question. A closed case shall result in immediate termination, dismissal, or removal of the SI.
- (4) The AD or CP shall document in writing the reasons for a closed case, and shall provide that information to the SI.

Stat. Auth.: ORS 181.~~534~~, ~~181.537~~, 409.027 & 409.050

Stats. Implemented: ORS 181.534, ~~181.537~~-&, 409.010, 409.027 & 443.004

407-007-0330

Contesting a Fitness Determination

- (1) A final fitness determination of denied or restricted approval is considered an adverse outcome. An SI with an adverse outcome may contest that fitness determination.
- (2) If an SI is denied, the SI may not hold the position, provide services or be employed, licensed, certified, or registered, or otherwise perform in positions covered by these rules. An SI appealing a restricted approval may only work under the terms of the restriction during the appeal.
- (3) If an adverse outcome is changed at any time during the appeal process, the change does not guarantee employment or placement.
- (4) An SI may challenge the accuracy or completeness of information provided by the OSP, the FBI, or other agencies reporting information to the Department, by appealing to the entity providing the information. These challenges are not subject to the Department's appeal process.
- (5) An SI has the right to represent him or herself or have legal representation during the appeal process. ~~The SI may not be represented by a lay person.~~ For the purpose of this rule, the term "SI" shall be considered to include the SI's legal representative.
 - (a) An SI who is appealing an adverse outcome regarding the position of homecare worker as defined in ORS 410.600 may be represented by a labor union representative pursuant to ORS 183.459.
 - (b) For all other SIs, the SI may not be represented by a lay person.
- (6) An SI may contest an adverse fitness determination by requesting a contested case hearing. The contested case hearing process is conducted in accordance with ORS 183.411 to 183.497 and the Attorney General's Uniform and Model Rules of Procedure for the Office of Administrative Hearings (OAH), OAR 137-003-0501 to 137-003-0700.
 - (a) To request a contested case hearing, the SI shall complete and sign the Hearing Request form.
 - (b) The completed and signed form must be received by the Department within 45 calendar days after the effective date of action listed on the notice of the fitness determination.
 - (c) In the event an appeal is not timely, the Department shall determine, based on a written statement from the SI and available information, if there is good cause to proceed with the appeal.

TEMPORARY AMEND

- (d) The Department may refer an untimely request to the OAH for a hearing on the issue of timeliness.
- (7) The Department may conduct an administrative review before referring the appeal to OAH.
 - (a) The SI must participate in the administrative review. Participation may include but is not limited to providing additional information or additional documents requested by the BCU within a specified amount of time.
 - (b) The administrative review is not open to the public.
- (8) The Department may conduct additional criminal records checks or abuse checks during the contested case hearing process to update or verify the SI's ~~criminal records~~ potentially disqualifying convictions or conditions and factors to consider in the weighing test. If needed, the Department shall amend the notice of fitness determination while still maintaining the original hearing rights and deadlines.
- (9) The Department shall be represented by a hearing representative in contested case hearings. The Department may also be represented by Department of Justice's Office of the Attorney General.
 - (a) The Department shall provide the administrative law judge and the SI a complete copy of available information used during the ~~criminal records~~ background checks and fitness determinations. The notice of contested case and prehearing summary and other documents may be mailed by regular first class mail.
 - (b) ~~SI~~ An SI may not have access to confidential information contained in abuse investigation reports or other records collected or developed during the abuse check process without a protective order limiting further disclosure of the information.
 - (A) A protective order issued pursuant to this section must be issued by an administrative law judge as provided for in OAR 137-003-0570(8) or by a court of law.
 - (B) In conjunction with a protective order issued pursuant to this section, individually identifying information relating to clients, witnesses, and other persons identified in abuse investigation reports or other records collected or developed during the abuse check process shall be redacted prior to disclosure, except for the information identifying the SI.
- (c) The contested case hearing is not open to the public.
- (d) The administrative law judge shall make a new fitness determination based on evidence and the contested case hearing record.

TEMPORARY AMEND

- (e) The only remedy an administrative law judge may grant is a fitness determination that the subject individual is approved, approved with restrictions, or denied. Under no circumstances shall the Department or the QE be required to place an SI in any position, nor shall the Department or the QE be required to accept services or enter into a contractual agreement with an SI.
 - (f) A hearing pursuant to these rules may be conducted in conjunction with a licensure or certification hearing for the SI.
- (10) The notice of fitness determination issued is final as if the SI never requested a hearing in the following situations:
- (a) The SI failed to request a hearing in the time allotted in this rule. No other document will be issued after the notice of fitness determination.
 - (b) The SI withdraws the request for hearing at any time during the appeal process.
- (11) The Department may make an informal disposition based on the administrative review. The Department shall issue a final order and new notice of fitness determination. If the resulting fitness determination is an adverse outcome, the appeal shall proceed to contested case hearing.
- (12) The Department shall issue a dismissal order in the following situations:
- (a) The SI may withdraw a hearing request verbally or in writing at any time before the issuance of a final order. A dismissal order due to the withdrawal is effective the date the withdrawal is received by the Department or the OAH. The SI may cancel the withdrawal in writing within 14 calendar days after the date of withdrawal.
 - (b) The Department shall dismiss a hearing request when the SI fails to participate in the administrative review. Failure to participate in the administrative review shall result in termination of hearing rights. The order is effective on the due date for participation in the administrative review. The Department shall review a good cause request to reinstate hearing rights if received in writing by the Department within 14 calendar days.
 - (c) The Department shall dismiss a hearing request when the SI fails to appear at the time and place specified for the contested case hearing. The order is effective on the date scheduled for the hearing. The Department shall review a good cause request to reinstate hearing rights if received in writing by the Department within 14 calendar days of the order.
- (13) After a hearing, the administrative law judge shall issue a proposed and final order.

- (a) If no written exceptions are received by the Department within 14 calendar days after the service of the proposed and final order, the proposed and final order becomes the final order.
 - (b) If timely written exceptions to the proposed and final order are received by the Department, the Department's Director or designee shall consider the exceptions and serve a final order, or request a written response or a revised proposed and final order from the administrative law judge.
- (14) Final orders, including dismissal and default orders, are subject to reconsideration or rehearing petitions within 60 calendar days after the order is served, pursuant to OAR 137-003-0675.
- (15) The Department may provide the QE's AD with the results of the appeal.

Stat. Auth.: ORS 181.537, 183.459, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537, ~~183.341~~ & 459, 409.010, 409.027 & 443.004

407-007-0340

Record Keeping, Confidentiality

- (1) All LEDS reports are confidential and the AD shall maintain the reports in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
 - (a) LEDS reports are confidential and may only be shared with another AD if there is a need to know consistent with these rules.
 - (b) The LEDS report and any photocopies may not be shown or given to the SI.
- (2) The results of a national criminal records check provided by the FBI or the OSP are confidential and may not be disseminated by the Department unless:
 - (a) If a fingerprint-based criminal records check was conducted on the SI, the SI shall be provided a copy of the results if requested.
 - (b) The state and national criminal offender information shall be provided as exhibits during the contested case hearing.
- (3) The results of an abuse check are confidential and may not be disseminated by the Department except in compliance with confidentiality statutes and guidelines of the Department. An SI may not have access to confidential information contained in abuse investigation reports or other records collected or developed during the abuse check process without a protective order limiting further disclosure of the information during the contested case hearing process.

- (4) All completed Background Check Request forms, other criminal records information, and other records collected or developed during the ~~criminal records~~ background check or contested case process shall be kept confidential and disseminated only on a need-to-know basis.
- (45) The Department shall retain and destroy all criminal records check documents pursuant to federal law and records retention schedules published by Oregon State Archives.
- (56) Documents may be requested and reviewed by the Department and the OSP for the purposes of determining and ensuring compliance with these rules.
- (67) Neither local ADs nor the Department may re-create past notices of fitness determinations. If an error is discovered on a notice of fitness determination, the local AD or the Department may correct it by issuing an amended notice of fitness determination.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537-~~&~~, 409.010, 409.027 & 443.004

407-007-0350

Immunity from Liability

- (1) The Department, QE, AD, or CP, acting within the course and scope of employment, have immunity from any civil liability that might otherwise be incurred or imposed for determining, in accordance with ORS 181.537, that an SI is fit or not fit to hold a position, provide services, or be employed, licensed, certified, or registered.
- (2) The Department, QE, AD, or CP, acting within the course and scope of employment, and an employer or employer's agent are not liable for the failure to hire a prospective employee or the decision to discharge an employee on the basis of the QE's decision if they in good faith comply with:
 - (a) ORS 181.537 and ORS 409.027; and
 - (b) The decision of the QE or employee of the QE acting within the course and scope of employment.
- (3) No employee of the state, a business, or an organization, acting within the course or scope of employment, is liable for defamation, invasion of privacy, negligence, or any other civil claim in connection with the lawful dissemination of information lawfully obtained under ORS 181.537.

Stat. Auth.: ORS 181.537, 409.027 & 409.050

Stats. Implemented: ORS 181.534, 181.537-~~&~~, 409.010, 409.027 & 443.004