

**CHAPTER 407
DEPARTMENT OF HUMAN SERVICES**

**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 supplement OAR 125-007-0200 to 125-007-0330 with guidelines and requirements specific to background checks for Department of Human Services (Department) and Oregon Health Authority (Authority) subject individuals (SIs). These rules provide for the reasonable screening under ORS 181A.195, 181A.200, and 409.027 of SIs 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 an SI when conducting fitness determinations based upon such information. The fact that an SI is approved does not guarantee employment or placement. These rules do not apply to individuals subject to OAR 407-007-0000 to 407-007-0060 (DHS Employees, Volunteers, and Contractors) or 407-007-0400 to 407-007-0460 (Abuse Check Rules for Department Employees and Volunteers).
- (3) Providers for the Department and the Authority are subject to criminal records and abuse checks. The Authority authorizes the Department to act on its behalf in carrying out criminal and abuse checks associated with programs or activities administered by the Authority. References in these rules to the Department or Authority shall be construed to be references to either or both agencies.

Stat. Auth.: ORS 181A.195, 181A.200, 183.459, 409.025, 409.027, 409.050, 410.020, 411.060, 411.122, 413.036, 418.016, 418.640, 441.055, 443.730, 443.735 & 678.153

Stats. Implemented: ORS 181A.195, 181A.200, 183.459, 409.010, 409.025, 409.027, 411.060, 411.122 & 443.004

407-007-0210

Definitions

In addition to the definitions in OAR 125-007-0210 and 407-007-0010, the following definitions apply to OAR 407-007-0200 to 407-007-0370:

- (1) "Appointing authority" means an individual designated by the qualified entity (QE) who is responsible for appointing QE designees (QEDs). Examples include but are not limited to human resources staff with the authority to offer and terminate employment, a business owner, a member of the board of directors, a director, or a program administrator.
- (2) "Ineligible due to ORS 443.004" means BCU has determined that an SI, subject to ORS 443.004 and either OAR 407-007-0275 or 407-007-0277, has one or more convictions that prohibit the SI from holding the position listed in the background check request.

- (3) “Mandatory exclusion” means BCU has determined that an SI, subject to federal law or regulation, has one or more convictions or conditions that prohibit the SI from holding the position listed in the background check request.
- (4) “Qualified entity (QE)” means a community mental health or developmental disability program, local health department, or an individual, business, or organization, whether public, private, for-profit, nonprofit, or voluntary, that provides care, including a business or organization that licenses, certifies, or registers others to provide care (see ORS 181A.200).
- (5) “QE designee (QED)” means an individual appointed by the QE’s appointing authority to handle background checks on behalf of the QE.
- (6) “QE Initiator (QEI)” means an approved SI to whom BCU has granted access to the Criminal Information Management System (CRIMS) for one QE for the purpose of entering background check request data.
- (7) “Subject individual (SI)” means an individual on whom BCU conducts a criminal records check and an abuse check, and from whom BCU may require fingerprints for the purpose of conducting a national criminal records check.
 - (a) An SI includes any of the following:
 - (A) An individual who is licensed, certified, registered, or otherwise regulated or authorized for payment by the Department or Authority and who provides care.
 - (B) An employee, contractor, temporary worker, or volunteer who provides care or has access to clients, client information, or client funds within or on behalf of any entity or agency licensed, certified, registered, or otherwise regulated by the Department or Authority.
 - (C) Any individual who is paid directly or indirectly with public funds who has or will have contact with recipients of:
 - (i) Services within an adult foster home (defined in ORS 443.705); or
 - (ii) Services within a residential facility (defined in ORS 443.400).
 - (D) Any individual who works in a facility and provides care or has access to clients, client information, or client funds secured by any residential care or assisted living facility through the services of a personnel services or staffing agency.
 - (E) Any individual who works in a facility and provides care, or has access to clients, client information, or client funds secured by any nursing facility through the services of a personnel services or staffing agency.
 - (F) Except as excluded in section (7)(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.
 - (G) An individual working or volunteering for a private licensed child caring agency, an In-Home Safety and Reunification Services (ISRS) program, a Strengthening, Preserving and Reunifying Families (SPRF) provider, or system of care contractor providing child welfare services pursuant to ORS chapter 418.

- (H) A homemaker worker as defined in ORS 410.600, a personal support worker as defined in ORS 410.600, a personal care services provider, or an independent provider employed by a Department or Authority client who provides care to the client if the Department or Authority helps pay for the services.
 - (I) 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 Office of Child Care of the Oregon Department of Education. This includes all individuals listed in OAR 461-165-0180(4).
 - (J) An appointing authority, QED, or QEI associated with any entity or agency licensed, certified, registered, otherwise regulated by the Department, or subject to these rules.
 - (K) An individual providing on the job certified nursing assistant classes to staff within a long term care facility.
 - (L) A student enrolled in a Board of Nursing approved nursing assistant training program in which the instruction and training occurs solely in a nursing facility.
 - (M) Except for those excluded under section (7)(b)(B), a student or intern who provides care or has access to clients, client information, or client funds within or on behalf of a QE.
 - (N) Any individual serving as an owner, operator, or manager of a room and board facility pursuant to OAR chapter 411, division 68.
 - (O) An employee providing care to clients of the Department's Aging and People with Disabilities (APD) programs who works for an in-home care agency as defined by ORS 443.305 who has a contract with the Department's APD programs.
 - (P) Any individual who is required to complete a background check pursuant to Department or Authority program rules or a contract with the Department or Authority, if the requirement is within the Department or Authority's statutory authority. Specific statutory authority or reference to these rules and the positions under the contract subject to a background check must be specified in the contract. The exceptions in section (7)(b) do not apply to these SIs.
- (b) An SI does not include:
- (A) Any individual under 16 years of age.
 - (B) A student or intern in a clinical placement at a clinical training setting subject to administrative rules implemented under ORS 413.435.
 - (C) Department, Authority, or QE clients. The only circumstance in which BCU shall allow a check to be performed on a client pursuant to this paragraph is if the client falls within the definition of "subject individual" as listed in sections (7)(a)(A)-(E) and (7)(a)(G)-(P) of this rule, or if the facility is dually licensed for different populations of vulnerable individuals.
 - (D) Individuals working in child care facilities certified or registered by OED.

- (E) Individuals employed by a private business that provides services to clients and the general public and is not regulated by the Department or Authority.
- (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 a licensed or certified QE. The QE shall ensure active supervision of these individuals while on QE property and the QE may not allow unsupervised contact with QE clients or residents. This exclusion does not apply to a business that receives funds from the Department or Authority for care provided by an employee of the business.
- (G) Individuals employed by a private business in which a client of the Department or Authority is working as part of a Department- or Authority-sponsored employment service program. This exclusion does not apply to an employee of a business that receives funds from the Department or Authority for care provided by the employee.
- (H) Employees, contractors, students, interns, and volunteers working in hospitals, ambulatory surgical centers, outpatient renal dialysis facilities, and freestanding birthing centers, as defined in ORS 442.015, and special inpatient care facilities as defined by the Authority in administrative rule.
- (I) Volunteers, who are not under the direction and control of a licensed, certified, registered, or otherwise regulated QE.
- (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 Authority's Health Systems Division to provide prevention, evaluation, or treatment services. This exclusion does not apply to programs specifically required by other Authority program rules to conduct criminal records checks in accordance with these rules.
- (N) Individuals working for a transit service provider which conducts background checks pursuant to ORS 267.237.
- (O) Emergency medical technicians and first responders certified by the Authority's Emergency Medical Services and Trauma Systems program.
- (P) Employees, contractors, temporary workers, or volunteers of continuing care retirement communities registered under OAR chapter 411, division 67.
- (Q) Individuals hired by or on behalf of a resident in a QE to provide care privately to the resident.
- (R) An employee, contractor, temporary worker, or volunteer who provides care or has access to clients, client information, or client funds within or on behalf of any entity or agency licensed, certified, registered, or otherwise regulated by

the Department or Authority, where the clients served permanently reside in another state.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 & 443.004

407-007-0220

Background Check Required

- (1) BCU shall conduct criminal records checks on all SIs through LEDS maintained by the Oregon State Police (OSP) in accordance with ORS chapter 181 and the rules adopted thereto (see OAR chapter 125, division 007; and chapter 257, division 15).
- (2) If a national criminal records check is necessary, OSP shall provide BCU results of national criminal records checks conducted pursuant to ORS 181A.195, including fingerprint identification, through the FBI.
- (3) BCU shall conduct abuse checks using available abuse investigation reports and associated documents.
- (4) Unless an SI meets a criterion under section (7) of this rule, an SI must have a background check in the following circumstances:
 - (a) An individual who becomes an SI on or after the effective date of these rules.
 - (b) The SI changes employers to a different QE.
 - (c) The individual, whether previously considered an SI or not, changes positions under the same QE, and the new position requires a background check.
 - (d) The individual, whether previously considered an SI or not, changes Department or Authority-issued licenses, certifications, or registrations, and the license, certification, or registration requires a background check under these rules.
 - (e) For a student enrolled in a long term care facility nursing assistant training program for employment at the facility, a new background check is required when the student becomes an employee at the facility. A new background check is not required by the Department or the Authority at graduation from the training program or at the granting of certification by the Board of Nursing unless the Department, the Authority, or the QE have reason to believe that a background check is justified.
 - (f) A background check is required by federal or state laws or regulations, other Department or Authority administrative rules, or by contract with the Department or Authority.
 - (g) When BCU or the QE has reason to believe that a background check is justified. Examples include but are not limited to:
 - (A) Any indication of possible criminal or abusive behavior by an SI.
 - (B) A lapse in working or volunteering in a position under the direction and control of the QE but the SI is still considered in the position. For example, an extended period of leave by an SI. The QE determines the need for a background check.
 - (C) Quality assurance monitoring by the Department or Authority of a previously conducted criminal records check or abuse check.

- (5) If the SI is subject to a background check due to involvement with the foster or adoptive placement of a child and:
 - (a) Is subject to the Interstate Compact on Placement of Children (ORS 417.200 and OAR 413-040-0200 to 413-040-0330), the background check must comply with Interstate Compact requirements.
 - (b) Is subject to the Inter-County Adoption Act of 2000 (42 USC 14901 et seq.), the background check must comply with federal requirements and ORS 417.262.
- (6) If QEs, Department program rules, or Authority program rules require an SI to report any new arrests, charges, or convictions, the QE may determine if personnel action is required if the SI does not report. Personnel action may include a new background check.
- (7) A background check is not required under the following circumstances:
 - (a) A homecare worker or personal support worker, as defined in ORS 410.600, has a Department background check notice of final fitness determination dated within the recheck period according to Department program rules showing that the homecare worker or personal support worker has been approved or approved with restrictions, and listing a worksite of "various," "various clients," "statewide," or similar wording.
 - (b) A personal care services provider, lifespan respite or other respite care provider, or an independent provider paid with Department or Authority funds who changes or adds clients within the same QE, Department, or Authority district, and the prior, documented criminal records check or abuse check conducted within the previous 24 months through the Department or Authority has been approved without restrictions.
 - (c) The SI is a child care provider as described in OAR 461-165-0180 who changes or adds clients and who has been approved without restrictions within the required recheck period according to Department program rules.
 - (d) The SI remains with a QE in the same position listed on the background check request 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 background check.
 - (e) The SI is on the background check registry maintained under OAR 407-007-0600 to 407-007-0640.
- (8) Background checks are completed on SIs who otherwise meet the qualifications of the position listed on the background check request. A background check may not be used to screen applicants for a position.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 & 443.004

407-007-0230

Qualified Entities

- (1) A QE and its appointing authority must be approved in writing by the Department or Authority pursuant to these rules in order to appoint a QED. Documentation of a current and valid license, certification, contract, or letter of approval from the Department or Authority are considered

proof of approval. Unless specifically indicated otherwise in these rules, all QEs and appointing authorities discussed in these rules are considered approved.

- (2) A QE shall ensure the completion of background checks for all SIs who are the QE's employees, volunteers, or other SIs under the direction or control of the QE.
- (3) BCU may allow a QE's appointing authority or the QED to appoint one or more QEIs based on the needs of the QE and the volume of SIs under the QE.
- (4) A QE's appointing authority shall appoint QEDs as needed to remain in compliance with these rules and shall communicate any changes regarding QEDs or QEIs to BCU. BCU strongly recommends that the QE have at least one QED at any facility where clients are receiving care in order to handle any immediate QED responsibilities, such as removing an SI from work or placement when required.
- (5) If for any reason a QE no longer has any QEDs, the QE or appointing authority shall ensure that the confidentiality and security of background check records by immediately providing all background check related documents to BCU or to another QE as determined by BCU.
- (6) BCU shall provide QEs with periodic training and on-going technical assistance.
- (7) Any decisions made by BCU in regard to these rules are final and may not be overturned by any QE.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.200, 409.010, 409.027 & 443.004

407-007-0240

QE Designees and QE Initiators

- (1) All requirements in this section must be completed within 90 calendar days. To receive BCU approval, a QED must meet the following requirements:
 - (a) A QED must be one of the following:
 - (A) Employed by the agency for which the QED will handle criminal records check information.
 - (B) Contracted with the QE to perform as a QED.
 - (C) Employed by another similar QE or a parent QE. For example, an assisted living facility QED may act as QED for another assisted living facility.
 - (D) The licensee of the QE.
 - (b) A QED must be an approved SI with a record in CRIMS within the past three years for at least one of the QEs for which the QED will manage background checks.
 - (c) A QED must have:
 - (A) Competency in computer skills for accessing CRIMS online, entering data, corresponding via email, and managing background check records in CRIMS;
 - (B) Work-related access to a desktop or laptop computer and the internet; and
 - (C) A work-related email account.

- (d) A QED must complete a certification program and successfully pass any BCU required testing.
 - (e) An appointing authority must appoint a QED. The applicant QED must complete and submit required documents and information to BCU for processing and registration.
- (2) BCU shall deny the individual's status as a QED if the individual does not meet QED requirements. Once denied, the individual may no longer perform the duties of a QED. There are no exceptions for individuals who fail to meet QED requirements.
- (3) An approved QED shall have the following responsibilities:
- (a) Demonstrate understanding of and adherence to these rules in all actions pertaining to the background check process.
 - (b) Act as the Department's designee in any action pursuant to these rules and the background check process. A QED may not advocate for an SI during any part of the 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. A QED may not view criminal offender information. A QED may not view abuse investigation reports and associated abuse investigation exhibits or documents as part of the background check process.
 - (d) Verify the SI's identity or ensure that the same verification requirements are understood by each individual responsible for verifying identity. The QE may verify identity at any time during the hiring or placement process up to the submission of the background check request.
 - (A) If conducting a background check on the SI for the first time or at rehire of the SI, a QED shall verify identity or ensure identity is verified by using methods which include but are not limited to reviewing the SI's current and valid government-issued photo identification and confirming the information on the photo identification with the SI, the information included in the background check request, and the information written on the fingerprint card if a national criminal records check is conducted.
 - (B) If an SI is being rechecked for the same QE without any break in placement, service, or employment, review of government-issued photo identification may not be necessary. The QED shall verify the SI's name, current address, and any aliases or previous names, or ensure this information is verified.
 - (e) Ensure that an SI is not permitted to work, volunteer, reside, or otherwise hold any position covered by these rules before the submission of the background check request to BCU.
 - (f) Review the SI's background check request to ensure completeness of the information, to verify identity, and to determine if the SI has any disclosed criminal history. If the SI has adverse criminal history within the five year period from the date the SI signed the background check request, the QED may request that BCU make a preliminary fitness determination requiring a weighing test. The request must be through CRIMS or in writing.

- (g) Ensure that the result of the preliminary fitness determination granting the QE to hire the SI on a preliminary basis, or prohibiting the QE from hiring the SI on a preliminary basis, is followed.
 - (h) 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.
 - (i) 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 BCU reinstates hired on a preliminary basis or the completion of a final fitness determination allowing the SI to resume the position.
 - (j) Ensure that the SI has directions to complete a fingerprint capture and monitor the SI's process in getting the fingerprints taken in a timely manner.
 - (k) Notify BCU of any changes regarding an SI who still has a background check in process, including but not limited to address or employment status changes.
 - (L) Monitor the status of background check applications and investigate any delays in processing.
 - (m) Ensure that documentation required by these rules is processed and maintained in accordance with these rules.
 - (n) Notify BCU immediately if arrested, charged, or convicted of any crime, or if found responsible for abuse by the Department or Authority.
- (4) BCU may change QED status in the following circumstances which include but are not limited to:
- (a) When the position with the QE ends or when the QE terminates the appointment. The QE shall notify BCU immediately upon the end of the position or termination of the appointment and BCU shall inactivate QED status.
 - (b) If a QED fails to comply with responsibilities or fails to continue to meet the requirements for QED status, as applicable. After suspending or revoking the appointment, the QE must immediately notify the BCU in writing. If BCU takes the action to suspend or revoke the appointment, it must immediately notify the QE in writing.
 - (c) If a QED fails to recertify, BCU shall revoke QED status.
- (5) Any changes to QED status are not subject to appeal rights unless the denial or termination results in immediate loss of employment or position. A QED losing employment or position has the same hearing rights as other SIs under these rules.
- (6) If a QED leaves employment or position with the QE for any reason, BCU shall inactivate QED status. If the individual finds employment with another QE, BCU shall determine the requirement for reactivation of QED status.
- (7) BCU shall review and recertify appointments of QEDs, up to and including a new application, background check, and additional training under the following circumstances:
- (a) Every three years; or
 - (b) At any time BCU has reason to believe the individual no longer meets QED requirements including but not limited to indication of criminal or abusive behavior or noncompliance with these rules.

- (8) With BCU approval, QEs may appoint QEs to enter background check request into CRIMS. QEs must:
- (a) Be currently approved SIs for the QE;
 - (b) Possess competency in computer skills for accessing CRIMS online and entering background check records into CRIMS;
 - (c) Maintain internet access and working email accounts to access CRIMS; and
 - (d) Meet other criteria as determined by BCU and the QE.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 & 443.004

407-007-0250

Background Check Process

- (1) A QE and SI shall use CRIMS to request a background check. In addition to information required in OAR 125-007-0220, the background check request shall include the following information regarding an SI:
- (a) Worksite location or locations where the SI will be working;
 - (b) 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. Disclosure includes any juvenile record of arrests, charges, or the outcome of arrests or charges against a juvenile.
 - (B) The disclosed crimes and the dates must reasonably match the SI's criminal offender information and other criminal records information, as determined by BCU.
 - (c) Disclosure of other information to be considered in the event of a weighing test.
 - (A) The SI may provide mitigating information for BCU to review in a weighing test.
 - (B) BCU may require the SI to provide other information as needed to conduct the weighing test.
- (2) The background check request shall include the following notices to the SI:
- (a) A notice regarding disclosure of Social Security number indicating that:
 - (A) The SI's disclosure is voluntary; and
 - (B) The Department requests the Social Security number 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 BCU shall conduct an abuse check on the SI. Unless required by program rule, an SI is not required to disclose any history of potentially disqualifying abuse, but may provide BCU with mitigating or other information.
- (3) Using identifying information submitted in a background check request, BCU shall conduct an abuse check to determine if the subject individual has potentially disqualifying abuse.

- (4) BCU shall conduct an Oregon criminal records check. Using information submitted on the background check request, BCU may obtain criminal offender information from LEDS and may request other criminal records information as needed.
- (5) BCU shall handle criminal offender information in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 125, division 007 and chapter 257, division 15).
- (6) BCU may conduct a fingerprint-based national criminal records check.
 - (a) A fingerprint-based national criminal records check may be completed under any of the following circumstances:
 - (A) The SI has been outside Oregon:
 - (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(4).
 - (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 BCU 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) BCU or the QE has reason to question the identity of the SI or the information on the criminal record found in LEDS.
 - (E) A fingerprint-based criminal records check is required by federal or state laws or regulations, other Department or Authority rules, or by contract with the Department or Authority.
 - (F) The SI is an employee of an agency which the Centers of Medicare and Medicaid Services has designated high risk pursuant to 42 CFR 424.518.
 - (G) Any SI applying to be or renewing the position with regard to child adoption or children in foster care licensed by the Department or private licensed child caring agencies. Renewing SIs do not need a fingerprint-based criminal records check if BCU has a record of a previous fingerprint-based criminal records checks that is within BCU's retention schedule. Applicable SI positions include:
 - (i) A relative caregiver, foster parent, or adoptive parent in Oregon;
 - (ii) An adult household member in an adoptive or child foster home 18 years of age and over;
 - (iii) A household member in an adoptive or child foster home under 18 years of age if there is reason to believe that the household member may pose a risk to children placed in the home; or
 - (iv) A respite care provider in an adoptive or child foster home.
 - (H) BCU has reason to believe that fingerprints are needed to make a final fitness determination.

- (b) BCU shall request a fingerprint capture for an SI under the age of 18 in accordance with OAR 125-007-0220(3).
- (c) The SI shall complete and submit a fingerprint capture when requested by BCU within the time frame indicated in a written notice. BCU shall send the request to the QE and the QED shall notify the SI.
 - (A) BCU shall give the SI notice regarding the Social Security number as set forth in section (2)(a) of this rule.
 - (B) BCU may require new fingerprint capture and its submission if previous fingerprint captures result in a rejection by OSP or the FBI.
- (7) BCU 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 BCU has reason to believe that out-of-state criminal records may exist and a national criminal records check cannot be accomplished.
 - (b) When BCU has been unable to complete a national criminal records check due to illegible fingerprints.
 - (c) When the national criminal records check results show incomplete information about charges or criminal records without final disposition.
 - (d) When there is indication of residency or criminal records in a state that does not submit all criminal records to the FBI.
 - (e) When, based on available information, BCU has reason to believe that a state-specific criminal records check is necessary.
- (8) In order to complete a background check and fitness determination, BCU may require additional information from the SI including but not limited to additional criminal, judicial, other background information, or proof of identity.
- (9) BCU may conduct a background check in situations of imminent danger.
 - (a) If the Department or Authority determines there is indication of criminal or abusive behavior that could more likely than not pose an immediate risk to vulnerable individuals, BCU shall conduct a new criminal records check on an SI without the completion of a new background check request.
 - (b) If BCU determines that a fitness determination based on the new background check would be adverse to the SI, BCU shall provide the SI, if available, the opportunity to disclose criminal records, potentially disqualifying conditions, and other information as indicated in OAR 407-007-0300 before completion of the fitness determination.
- (10) All criminal records checks conducted under this rule shall be documented.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010

407-007-0275

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

- (1) Section (2) of this rule applies to an SI who:
 - (a) Works with clients of the Department’s Office of Developmental Disabilities (DD) program.
 - (b) Works with clients of the Department’s APD programs and who is:
 - (A) An individual who is paid directly or indirectly with public funds who has or will have contact with recipients of services within:
 - (i) An adult foster home (defined in ORS 443.705); or
 - (ii) A residential facility (defined in ORS 443.400).
 - (B) Any direct care staff secured by any residential care or assisted living facility through the services of a personnel services or staffing agency and the direct care staff works in the facility.
 - (C) A homecare worker as defined in ORS 410.600, a personal support worker as defined in ORS 410.600, a personal care services provider, or an independent provider employed by a Department client who provides care to the client if the Department helps pay for the services.
 - (D) An employee providing care to the Department’s APD program clients who works for an in-home care agency as defined by ORS 443.305 which has a contract with the Department’s APD programs.
 - (E) An individual in a position specified as being subject in relevant Oregon statutes or Oregon administrative rules.
- (2) If BCU determines that an individual subject to this rule has a conviction listed in ORS 443.004, BCU shall make the determination of “ineligible due to ORS 443.004.” Under OAR 125-007-0260, this determination is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has. BCU shall provide notice of ineligibility due to ORS 443.004 to the individual.
- (3) An individual subject to this rule who is an employee and hired prior to July 28, 2009 is exempt from section (2) of this rule provided that the employee remains in the same position working for the same employer after July 28, 2009. This exemption is not applicable to licensees.
- (4) If an individual subject to this rule is grandfathered or not found ineligible due to ORS 443.004, the individual is subject to a fitness determination under OAR 125-007-0260 and 407-007-0320.
- (5) A determination of “ineligible due to ORS 443.004” is not subject to appeal rights under OAR 125-007-0300, 407-007-0330, 407-007-0335, 943-007-0335, or 943-007-0501.

Stat. Auth.: ORS 181A.200 & 409.050

Stats. Implemented: ORS 181A.200 & ORS 443.004

407-007-0277

Convictions Under ORS 443.004 Resulting in Ineligibility for Mental Health or Alcohol and Drug Program SIs

- (1) This rule applies to subject individuals who are mental health or substance abuse treatment providers defined under ORS 443.004(8).

- (2) If BCU determines that an individual is subject to this rule and has a conviction listed in ORS 443.004(5), BCU shall make the determination of “ineligible due to ORS 443.004.” Under OAR 125-007-0260, this determination is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has. BCU shall provide notice of ineligibility due to ORS 443.004 to the individual.
- (3) If an individual subject to this rule is not found ineligible due to ORS 443.004, the individual is subject to a fitness determination under OAR 125-007-0260 and 407-007-0320.
- (4) A determination of “ineligible due to ORS 443.004” is not subject to appeal rights under OAR 125-007-0300, 943-007-0335 or 943-007-0501.

Stat. Auth.: ORS 181A.195 & 409.050

Stats. Implemented: ORS 181A.200 & 443.004

407-007-0279

Federal Mandatory Exclusions

- (1) Convictions and conditions under 42 USC 1320a-7(a) result in mandatory exclusion for Sis.
 - (a) This sub section applies to an SI who is:
 - (A) Home care worker or personal support worker as defined in ORS 410.600.
 - (B) Is employed by:
 - (i) A residential facility as defined in ORS 443.400 that receives Medicare or state health care funds;
 - (ii) An in-home care agency as defined in ORS 443.005 that receives Medicare or state health care funds;
 - (iii) A home health agency as defined in ORS 443.005 that receives Medicare or state health care funds;
 - (b) If BCU determines that an individual is subject to this rule and has an exclusion listed in 42 USC 1320a-7, BCU shall make the determination of mandatory exclusion. Convictions or conditions requiring mandatory exclusion include:
 - (A) Convictions related to the delivery of Medicare or State health care program services.
 - (B) Convictions related to the abuse of a client or patient.
 - (C) Felony convictions related to health care fraud, if the offense occurred after August 21, 1996.
 - (D) Felony convictions related to the manufacture, delivery, prescription or dispensing of a controlled substance, if the offense occurred after August 21, 1996.
 - (c) Under OAR 125-007-0260, the determination of mandatory exclusion is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has.

- (d) A determination of mandatory exclusion is subject to appeal rights only if allowed under 42 UCS 1320a-7(c) or 42 USC 1320a-7(d). If allowed, appeals shall comply with OAR 125-007-0300, 943-007-0335 and 943-007-0501.
- (2) Convictions and conditions under 42 USC 12645g result in mandatory exclusion for SIs.
- (a) This subsection applies to a SIs who working or volunteering under the National and Community Service Act of 1990 as amended by the Serve America Act, including participants and employees in:
 - (A) Americorps;
 - (B) Foster Grandparents;
 - (C) Senior Companions; or
 - (D) Any other programs funded under national service laws.
 - (b) If BCU determines that an individual is subject to this rule and has an exclusion listed in 42 USC 12645g, BCU shall make the determination of mandatory exclusion. Exclusions include:
 - (A) Listing on, or requirement to be listed on a sex offender registry;
 - (B) Conviction for murder.
 - (C) Refusal to complete the background check.
 - (D) False statement by the SI in connection with criminal history disclosure.
 - (c) Under OAR 125-007-0260(2)(d), the determination of “mandatory exclusion” is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has.
 - (d) A determination of “mandatory exclusion” due to 42 USC 12645g is not subject to appeal rights under OAR 125-007-0300, 407-007-0330, 407-007-0335, 943-007-0335, or 943-007-0501.

Stat. Auth.: ORS 181A.195 & 409.050

Stats. Implemented: ORS 181A.195

407-007-0290

Other Potentially Disqualifying Conditions

Pursuant to OAR 125-007-0270, the following are potentially disqualifying conditions, if they exist on the date the Department receives the background check request:

- (1) The SI makes a false statement to the QE 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 for any crime in any jurisdiction.
- (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 was electronically submitted to BCU through CRIMS or the date BCU conducted a criminal records check due to imminent danger.
- (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 was signed or the date BCU 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) Potentially disqualifying abuse as determined from abuse investigation reports which have an outcome of founded, substantiated, or valid and in which the SI is determined to have been responsible for the abuse.
 - (a) For SIs associated with child foster homes licensed by the Department’s DD programs, child foster homes licensed through the Department’s Child Welfare Division, child foster homes licensed through a private licensed child caring agency, adoptive families through a private licensed child caring agency, or adoptive families through the Department’s Child Welfare Division, potentially disqualifying abuse includes:
 - (A) Child protective services history held by the Department or the Office of Adult Abuse Prevention and Investigations (OAAPI) regardless of the date of initial report;
 - (B) Child protective services history reviewed pursuant to the federal Adam Walsh Act requirements, determined by BCU 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 OAAPI and APD programs based on severity.
 - (b) For staff, volunteers, or contractors of a private licensed child caring agency, an ISRS program, a SPRF provider, or a System of Care contractor providing child welfare services pursuant to ORS chapter 418 potentially disqualifying abuse includes:
 - (A) Child protective services history held by the Department or OAAPI regardless of the date of initial report; 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 OAAPI and APD based on severity.
 - (c) For child care providers and associated subject individuals defined in OAR 407-007-0210:
 - (A) Child protective services history held by the Department or OAAPI 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 OAAPI and APD programs 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 OAAPI and APD programs based on severity.
- (12) Child protective services investigations open or pending through the Department or OAAPI as of the date the background check request was electronically submitted to BCU through CRIMS or the date BCU conducted a criminal records check due to imminent danger. This potentially disqualifying condition only applies to:
- (a) SIs associated with child foster homes licensed by the Department's DD programs, child foster homes licensed through the Department's Child Welfare Division, child foster homes licensed through a private licensed child caring agency, adoptive families through a private licensed child caring agency, or adoptive families through the Department's Child Welfare Division;
 - (b) Staff, volunteers or contractors of a private licensed child caring agency, an ISRS program, a SPRF provider, or a System of Care contractor, providing child welfare services pursuant to ORS chapter 418; or
 - (c) Child care providers and associated subject individuals defined in OAR 407-007-0210.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 & 443.004

407-007-0300
Weighing Test

If an SI has potentially disqualifying convictions under OAR 125-007-0270 or potentially disqualifying conditions under OAR 407-007-0290, BCU shall conduct a weighing test. The weighing test shall include consideration of factors pursuant to ORS 181A.195 and the following if available to the BCU at the time of the weighing test.

- (1) Circumstances regarding the nature of potentially disqualifying convictions and conditions including but not limited to:
 - (a) The details of incidents leading to the 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) The nature and type of abuse; and
 - (b) Other information gathered during the scope of the abuse investigation.
 - (c) The date of the abuse incident and abuse investigation.
 - (d) The quality of the abuse investigation including, if applicable, any exhibits and related documents with consideration taken into account regarding completeness, objectivity, and sufficiency.
 - (e) Due process provided to the SI after the abuse investigation.
 - (f) 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 or Authority's protective services, abuse, or other investigations in which the investigator documented behavior or conduct by the 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.
- (4) BCU 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 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 & 443.004

407-007-0315

Hired on a Preliminary Basis

- (1) A preliminary fitness determination is required to determine if an SI may participate in training or orientation, work, volunteer, or otherwise perform in the position listed on the background check request prior to a final fitness determination. An SI may not be hired on a preliminary basis prior to the completion of a preliminary fitness determination.
- (2) An SI may be hired on a preliminary basis only during the period of time prior to a final fitness determination and into the position listed on the background check request.
- (3) The SI must provide information required for a background check request and the QED must review the information.
- (4) The QED shall make one of the following determinations:
 - (a) If the SI makes no disclosures of criminal history, the QED may hire the SI on a preliminary basis in accordance with relevant program rules or QE policies.
 - (b) If the SI discloses any criminal history and all of the history occurred outside the five year period from the date the SI manually or electronically signed the background check request, the QED may hire the SI on a preliminary basis in accordance with relevant program rules or QE policies.

- (c) If the SI indicates any criminal history occurring within the five year period from the date the SI manually or electronically signed the background check request:
 - (A) The QED may allow the SI to be hired on a preliminary basis if the disclosed criminal history has the outcome of “dismissed,” “no complaint filed,” “expunged,” or other outcome that BCU determines is not adverse.
 - (B) The QED may not allow the SI to be hired on a preliminary basis if the disclosed criminal history has an outcome of “pending outcome,” “diversion or conditional discharge,” “convicted,” “on probation,” “juvenile adjudication,” “unknown,” or other outcome that BCU determines is adverse.
- (5) The QED shall submit the background check request to BCU immediately upon verification of the SI’s identity, the SI’s completion of the background check request, and the QED’s completion of the preliminary fitness determination.
- (6) If requested by the QED, BCU may conduct a preliminary fitness determination with a weighing test pursuant to OAR 125-007-0250.
- (7) The QE may not hire a SI on a preliminary basis under any of the following circumstances:
 - (a) Being hired on a preliminary basis or probationary status is not allowed under program rules.
 - (b) The SI has disclosed criminal history occurring within the past five years that has an outcome of “pending outcome,” “diversion or conditional discharge,” “convicted,” “on probation,” “juvenile adjudication,” “unknown” or other outcome BCU determines to be adverse and BCU has not completed a preliminary fitness determination resulting in the QE being allowed to hire the SI on a preliminary basis.
 - (c) The QE or BCU determines that:
 - (A) More likely than not, the SI poses a potential threat to vulnerable individuals, based on a preliminary fitness determination and weighing test;
 - (B) The SI’s most recent background check under these rules or other Department or Authority criminal records check rules or abuse check rules resulted in a denial; or
 - (C) The SI is currently involved in contesting a background check under these or other Department or Authority criminal records check rules or abuse check rules.
 - (D) BCU has reason to believe hiring on a preliminary basis is not appropriate based on circumstances or compliance with the background check process of the SI, QED, or QE.
 - (d) An outcome of no hiring on a preliminary basis may only be overturned by the BCU.
- (8) 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 (8)(b)(B) of this rule;

- (B) Know where the SI is and what the SI is doing; and
 - (C) Periodically observe the actions of the SI.
- (b) The individual providing the active supervision may be either:
- (A) An SI who has been approved without restrictions pursuant to these rules or previous Department or Authority criminal records check rules; or
 - (B) The adult client, an adult client's adult relation, the client's legal representative, or a child's parent or guardian. Active supervision by these individuals is appropriate in situations where care is given directly to clients usually in a home such as but not limited to in-home care, home health, or care by home care workers, personal care assistants, or child care providers.
 - (i) The adult client may actively supervise a homecare worker, personal care services provider, independent provider, or an employee of an in-home care agency or home health agency if the client makes an informed decision to employ the provider. Someone related to the client may also provide active supervision if the relative has been approved by the Department, the Authority, the QED, or the private-pay client receiving services through an in-home care or home health agency.
 - (ii) A child client's parent or guardian shall be responsible for providing active supervision in the case of child care providers. The supervision is not required to be performed by someone in the same building as the child.
- (9) An SI approved without restrictions within the previous 24 months through a documented criminal records check or abuse check pursuant to these rules or prior Department or Authority criminal records check rules or abuse check rules may be hired on a preliminary basis without active supervision. Twenty-four months is calculated from date of previous approval to the date of hire in the new position. 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 QE or BCU, the job duties in the new position are so substantially different from the previous position that the previous fitness determination is inadequate for the current position.
- (10) Revocation of hired on a preliminary basis is not subject to hearing or appeal. The QE or BCU may immediately revoke hired on a preliminary basis for any of the following reasons:
- (a) There is any indication of falsification of application.
 - (b) The SI fails to disclose convictions for any potentially disqualifying crimes, any arrests that did not result in convictions or any out of state arrests or convictions.

- (c) The QE or BCU determines that allowing the SI to be hired on a preliminary basis is not appropriate, based on the application, criminal record, position duties, or Department program rules.
- (11) Nothing in this rule is intended to require that an SI who is eligible to be hired on a preliminary basis be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request prior to a final fitness determination.
- (12) Preliminary fitness determinations must be documented in writing, including any details regarding a weighing test, if required.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 & 443.004

407-007-0320

Final Fitness Determinations

BCU shall make a final fitness determination pursuant to OAR 125-007-0260 after all necessary background checks have been received and a weighing test, if necessary, has been completed.

- (1) The final fitness determination results in one of the following outcomes:
 - (a) BCU 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, BCU determines that more likely than not, the SI poses no risk to the physical, emotional, or financial well-being of vulnerable individuals.
 - (b) BCU may approve an SI with restrictions if BCU determines that more likely than not, the SI poses no risk to the physical, emotional, or financial well-being of vulnerable individuals if certain restrictions are placed on the SI. Restrictions may include but are not limited to restrictions to one or more specific clients, job duties, or environments. A new background check and fitness determination shall be completed on the SI before removing a restriction.
 - (c) BCU shall deny an SI who the BCU determines, after a weighing test, more likely than not, poses a risk to the physical, emotional, or financial well-being of vulnerable individuals.
 - (d) In the following situations, the SI shall have no hearing rights and BCU shall consider a background check to have an outcome of incomplete fitness determination:
 - (A) The QE or SI discontinues the application or fails to cooperate with the background check or fitness determination process, including but not limited to refusal to be fingerprinted or failing to respond in a timely manner to written correspondence from BCU. The background check request is considered closed.
 - (B) BCU determines that the SI is ineligible due to ORS 443.004 in accordance with OAR 407-007-0275 or 407-007-0277. The background check request is considered completed.

- (C) BCU or the QE withdraws or closes the background check request before a final fitness determination for any reason. The background check request is considered closed.
 - (D) The SI withdraws the application, leaves the position prior to completion of the background check, or the Department cannot locate or contact the SI. The background check request is considered closed.
 - (E) The SI is determined to be ineligible for the position by the QE for reasons other than the background check. The background check request is considered closed.
 - (F) BCU determines that the SI is subject to OAR 407-007-0279 and has a conviction or condition listed. BCU makes a determination of mandatory exclusion if the background check request is considered completed. The SI has hearing rights only if granted in federal law.
- (e) BCU shall issue an intent to deny if the fitness determination is made under OAR 407-007-0335. The SI has expedited hearings rights under OAR 407-007-0335.
- (2) Upon completion of a final fitness determination, BCU or the QE shall provide notice to the SI.
 - (a) If approved, BCU shall provide notice to the QE through CRIMS. The QE shall provide the SI a copy of the notice or CRIMS documentation.
 - (b) If the final fitness determination is a denial based on potentially disqualifying abuse under OAR 407-007-0290(11)(d) and there are no other potentially disqualifying convictions or conditions, BCU shall issue a Notice of Intent to Deny and provide the SI hearing rights under OAR 407-007-0335.
 - (c) If denied or approved with restrictions, BCU shall issue a notice of fitness determination to the SI which includes the potentially disqualifying convictions or conditions that the outcome was based upon, information regarding appeal rights, and the notice becoming a final order in the event of a withdrawal or failure to appear at the hearing.
 - (d) The effective date of action shall be recorded on the notice or CRIMS documentation.
 - (3) BCU shall provide the QE notification of the final fitness determination when the SI is being denied or approved with restrictions.
 - (4) 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. A denial applies only to the position and application in question. A denial shall result in immediate termination, dismissal, or removal of the SI.
 - (5) When an SI is approved with restrictions, the SI shall only be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request and only under the stated restrictions. A restricted approval applies only to the position and application in question. A restricted approval shall result in immediate implementation of the restrictions.
 - (6) BCU shall maintain any documents obtained or created during the background check process.
 - (7) BCU shall make new fitness determinations for each background check request. The outcome of previous fitness determinations does not set a precedent for subsequent fitness determinations.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 & 443.004

407-007-0330

Contesting a Fitness Determination

- (1) An SI may contest a final fitness determination of denied or restricted approval pursuant to OAR 125-007-0300 unless already granted contested case hearing rights under OAR 407-007-0335.
- (2) If an SI is determined to have a mandatory exclusion pursuant to federal law and OAR 407-007-0279, the SI may have hearing rights only if allowed by federal law.
- (3) 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.
- (4) If an adverse outcome is changed at any time during the appeal process, the change does not guarantee employment or placement.
- (5) An SI may represent himself or herself or have legal representation during the appeal process. For the purpose of this rule, the term "SI" shall be considered to include the SI's legal representative.
 - (a) An SI who is appealing an adverse outcome regarding the position of homecare worker as defined in ORS 410.600 or personal support worker as defined in ORS 410.600 may be represented by a labor union representative pursuant to ORS 183.459.
 - (b) 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 OAR 125-007-0300, ORS 183.411 to 183.497 and the Attorney General's Uniform and Model Rules of Procedure for the Office of Administrative Hearings (OAH), OAR 137-003-0501 to 137-003-0700.
 - (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.
 - (c) BCU shall accept a properly addressed hearing request that was not timely filed if it was postmarked within the time specified for timely filing.
 - (d) In the event an appeal is not timely by the date of receipt or by the date of postmark, BCU shall determine, based on a written statement from the SI and available information, if there is good cause to proceed with the appeal.
 - (e) BCU may refer an untimely request to the OAH for a hearing on the issue of timeliness.
- (7) BCU may conduct an administrative review before referring the appeal to the 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) BCU may conduct additional criminal records checks or abuse checks during the contested case hearing process to update or verify the SI's potentially disqualifying convictions or conditions and factors to consider in the weighing test. If needed, BCU shall amend the notice of fitness determination while still maintaining the original hearing rights and deadlines.
- (9) The Department shall be represented by a hearing representative in contested case hearings. The Department may also be represented by the Office of the Attorney General.
 - (a) The administrative law judge shall make a new fitness determination based on evidence and the contested case hearing record.
 - (b) 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.
- (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) BCU 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 a contested case hearing.
- (12) BCU 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 BCU or the OAH. The SI may cancel the withdrawal in writing within 14 calendar days after the date of withdrawal.
 - (b) BCU 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. BCU shall review a good cause request to reinstate hearing rights if received in writing by BCU within 14 calendar days.
 - (c) BCU 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. BCU shall review a good cause request to reinstate hearing rights if received in writing by BCU 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 BCU 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 BCU, 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) BCU may provide the QED with the results of the appeal.

Stat. Auth.: ORS 181A.200, 183.459, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 183.459, 409.010, 409.027 & 443.004

407-007-0350

Immunity from Liability

(1) The Department, the Authority, and the QE, 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 181A.200, that an SI is fit or not fit to hold a position, provide services, or be employed, licensed, certified, or registered.

(2) The Department, and Authority, and the QE, 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 a fitness determination or closed case if they in good faith comply with:

(a) ORS 181A.200 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 181A.200.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 & 443.004

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VariANCES

(1) The Department and Authority may consider variance requests regarding these rules.

(a) The outcomes of a fitness determination made pursuant to these rules is not subject to variance. Challenges to fitness determinations may only be made by SIs through contested case hearing rights set forth in these rules.

(b) Neither the Department nor the Authority may grant variances to ORS 181A.195 and 181A.200.

(2) The Department or Authority may grant a variance to any section of these rules based upon a demonstration by the QE that the variance would not pose a significant risk to physical, emotional, or financial well-being of vulnerable individuals.

(3) The QE requesting a variance must submit, in writing, an application to the BCU that contains:

(a) The section of the rule from which the variance is sought;

(b) The reason for the proposed variance;

(c) The alternative practice, service, method, concept, or procedure proposed;

- (d) A plan and timetable for compliance with the section of the rule from which the variance is sought; and
 - (e) An explanation on how the welfare, health, or safety of individuals receiving care will be ensured during the time the variance is in effect.
- (4) The Assistant Director or designee for the Department and Authority's Shared Services, Office of Human Resources shall approve or deny the request for a variance.
 - (5) BCU shall notify the QE of the decision within 60 calendar days of the receipt of the request and shall provide a copy to other relevant Department or Authority program offices.
 - (6) Appeal of the denial of a variance request must be made in writing to the Department or Authority's Director, whose decision is final.
 - (7) The Department or Authority shall determine the duration of the variance.
 - (8) The QE may implement a variance only after receipt of written approval from BCU.
 - (9) Granting a variance does not set a precedent that must be followed by the Department or Authority when evaluating subsequent variance requests.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200 & 409.010, 409.027