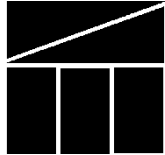


Adverse impact notification sent to Joint Commission on Administrative Rules, House Committee on Appropriations, and Senate Committee on Finance (COV § 2.2-4007.04.C): Yes¹ Not Needed

If/when this economic impact analysis (EIA) is published in the *Virginia Register of Regulations*, notification will be sent to each member of the General Assembly (COV § 2.2-4007.04.B).



Virginia Department of Planning and Budget Economic Impact Analysis

12 VAC 35-105 Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services
Department of Behavioral Health and Developmental Services
Town Hall Action/Stage: 5347/8703
October 4, 2019

Summary of the Proposed Amendments to Regulation

The State Board of Behavioral Health and Developmental Services (Board) seeks to add a new section to the regulation (12 VAC 35-105-435) titled *Provision of provider statement to any other provider*. This section, as proposed, seeks to protect adult individuals receiving developmental services from caregiver abuse, in the absence of a registry for adult abuse in the context of personal care services. The proposed change would require employers of caregivers to provide a written statement addressing the “character, ability, and fitness for employment” of their current or former employees at the request of such information from another organization/provider seeking to employ that caregiver, provided the caregiver in question consents to the disclosure of this information in writing.

Background

The 2019 Acts of Assembly (Chapter 776) directs the Board to amend the regulations governing licensed providers to include a requirement that licensed providers (could be an individual or organization) are to provide a character reference for a current or former employee

¹ Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

to another licensed provider who may be considering hiring that caregiver. Specifically, this requirement would apply when all of the following conditions are met.

- i. The person in question, who would be the subject of this statement, is a current or former employee or other individual currently or previously associated with the provider in a capacity that requires a criminal background check pursuant to §37.2-416 or §37.2-506 of the Code of Virginia.
- ii. The person in question has applied for employment or to fill a role that requires a criminal background check with a licensed provider.
- iii. The provider writing the statement receives a request for the statement from the other licensed provider.
- iv. The provider writing the statement receives written consent for the disclosure of such information, executed by the person who would be the subject of the statement.

The proposed new section of the regulation matches the language of the statute mandating it, almost verbatim. The only difference is that the proposed addition specifies that the statement be written.

Estimated Benefits and Costs

In the absence of a registry for workers who have been convicted of abuse or neglect towards adults in their care, any measure that provides greater information about a potential employee's propensity to engage in abuse or neglect would certainly benefit prospective employers as well as the adults under their care. Although the proposed addition does not require prospective employers to request a letter, they may feel encouraged to do so knowing that licensed providers would be required to provide a statement, if asked, provided the employee consents. To the extent that providers may have been reluctant to ask for a reference previously and are now more likely to request a statement, they as well as the people they serve may be benefited by this new requirement.²

Requiring a statement is a useful addition to the extent that it can provide information that would not already be available to the prospective employer. The first two conditions above imply that the employee has to be moving from a role that required a background check to

² If the prospective employer requests a statement and the applicant does not consent, that too could be informative.

another role that requires a background check, so the provider statement would only be adding information to the extent that it could provide more information than the background check. According to the Department of Behavioral Health and Developmental Services (DBHDS), a background check would only reveal a history of abuse if charges had been filed against the individual, and would not reveal the results of any internal investigations that did not involve law enforcement. Hence, the statements are intended to capture information that is likely to be sensitive in nature.

However, requiring that they be written may impose certain indirect costs that could reduce their effectiveness in this regard. In particular, the terms “character, ability, and fitness” are not defined in the regulation and are thus open to the provider’s interpretation. DBHDS staff clarified that the statement is intended to include the details and outcomes of any internal investigation into reported abuse involving the employee that had been conducted by the former employer. The third and fourth conditions above would protect employers by requiring that statements only be provided in response to a request initiated by the prospective employer with the documented consent of the former employee. To the extent that applicants rejected from jobs may respond by requesting a copy of the statement, requiring a written statement exposes the writer to some risk of legal action, even if it is by a very small degree. This may be more likely to occur if the one or more of the parties involved is a state or local agency, to which the employee could submit a Freedom of Information Act request to obtain their statement. Further, providers may bear some potential risk to their licensure status, or reputation, if the statement’s contents were disclosed following a request and details of internal investigations or other information about any abuse that occurred were more broadly known as a result.

Businesses and Other Entities Affected

The proposed amendment affects licensed providers of behavioral health and developmental services to adults, and their current, former, or prospective employees or associates, in positions that require criminal history background checks. DBHDS licenses approximately 1,100 providers in Virginia and they estimate that more than 100,000 people are

served by the providers.³ Many of these providers are likely to be small businesses, but the exact number is unknown.

Localities⁴ Affected⁵

The proposed requirements do not appear to affect particular localities disproportionately or introduce new costs for local governments.

Projected Impact on Employment

The proposed amendments are unlikely to affect total employment; any increase in caregivers' unemployment due to negative provider statements is likely to be marginal, in part because of the shortage of caregivers.

Effects on the Use and Value of Private Property

The proposed amendment has no effect on the use and value of private property, nor does it affect real estate development costs.

Adverse Effect on Small Businesses⁶:

Types and Estimated Number of Small Businesses Affected

DBHDS licenses approximately 1,100 providers in Virginia, many of whom are likely to be small businesses, although the exact number is unknown.

Costs and Other Effects

As discussed above, the proposal does not impose any direct costs, over and above the marginal time cost of preparing a statement. To the extent that some providers may have concerns about sharing the details of internal investigations, they may not provide substantive information in their written statements.

Alternative Method that Minimizes Adverse Impact

³ See Table 2 in <https://rga.lis.virginia.gov/Published/2017/RD552/PDF> for details on individuals served by Community Service Boards or State Facilities.

⁴ "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

⁵ § 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

⁶ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

In keeping with the language of the legislative mandate, the Board could remove the requirement that the statement be provided in writing. The requesting licensed provider could confirm to DBHDS that the character reference has been provided, even if it is verbal, so that the state agency would know that the proposed requirement has been met.

Legal Mandates

General: The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

Adverse impacts: Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.