

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

Agency Name: Ohio State Board of Optometry

Regulation/Package Title: Practicing under unlicensed control

Rule Number(s): 4725-5-06 & 4725-5-10

Date: April 26, 2012

**Rule Type:**

New

5-Year Review

Amended

Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

**Regulatory Intent**

**1. Please briefly describe the draft regulation in plain language.**

*Please include the key provisions of the regulation as well as any proposed amendments.*

This draft rulemaking package consists of two (2) rules in Chapter 4725-5 of the Ohio Administrative Code (OAC) governing misconduct. The draft rules, consistent with the CSI initiative, are written in plain language and established to clarify and provide guidelines and parameters within to benefit both the optometrist and the public.

The rules and proposed amendments for practicing under unlicensed control are reviewed and summarized in this document.

The draft rulemaking package addresses the splitting of fees and practicing under unlicensed control. The amendments being made to the current rules will clarify the relationship between a general corporation leasing space to an optometrist which potentially presents a risk to undermine health care quality, if the optometrist is required to meet a certain controlling level of performance mandated by the corporation, to include, but not limited to: sales volume, doctor coverage, what insurance providers to use, etc. By implementing the proposed changes, it will clarify for the optometrist what is reasonable and appropriate when entering into such agreements.

The proposed changes to these rules were initially implemented as part of Senate Bill 2, the Common Sense Initiative, which states;

**“WHEREAS**, small businesses are disproportionately impacted by regulations, particularly those that are unclear or overly restrictive. Small businesses are the economic engine of the economy. The vast majority of businesses in Ohio, and throughout the country, are small businesses. Small businesses are a vital component in creating new jobs and fostering innovation. However, complying with confusing, duplicative, or ineffective regulations strain their resources and divert effort from job creation and production. In too many cases, Ohio’s regulatory framework has worked against, not with, these small businesses.

**WHEREAS**, regulations play an important role in promoting fair competition, protecting the public health, and implementing the intent of the General Assembly. All of Ohio benefits from regulations that are in the public interest and are enforced properly. Protecting the public is always first and foremost, and regulatory compliance increases when regulations are easier to understand and to follow.”

The existing rules require of clarification to meet the expectations within the Common Sense Initiative. The changes will assist all stakeholders and ensure undo corporate influence on the patient.

**2. Please list the Ohio statute authorizing the Agency to adopt this regulation.**

Ohio Revised Code (ORC) Section 4725.09 is the statutory authority for Ohio Administrative Code rules stating, “(A) The state board of optometry shall adopt rules as it considers necessary to govern the practice of optometry and to administer and enforce sections 4725.01 to 4725.34 of the Revised Code. All rules adopted under those sections shall be adopted in accordance with Chapter 119. of the Revised Code.”

- 3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**  
*If yes, please briefly explain the source and substance of the federal requirement.*

No.

- 4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not applicable.

- 5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

Any outside control, either direct or indirect, can adversely affect the independent and autonomous environment that is both mandated and legislated to this profession. In fact, the following sentence from Ohio Administrative Rule 4725-5-06 which permits the leasing of space from a general corporation or an unlicensed individual states: “The intent of this rule is to maintain the licensee’s professional autonomy from the corporation or individual owner.”

An optometrist can be neither independent nor autonomous if a lease agreement contains language which mandates pricing of professional fees, managed health care plans or any other professional judgments that are the sole discretion of the practitioner.

Nothing in the regulation indicates that indirect control should be interpreted as a matter of degree. Like direct control, indirect control is strictly prohibited. As such, unlicensed entities shall have no control over an optometrist’s business, whether it is through a contractual relationship or by a lease agreement.

The benefits of Ohio’s important health and safety laws regulating the eye care field outweigh any incidental burden those laws may have on interstate commerce.

- 6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Success will be measured by having the rules written in plain language with more specific direction provided to the optometrist and the general corporation or unlicensed individual.

The State Board of Optometry staff office receives a number of phone inquiries weekly regarding the issues being described in the rule amendments being submitted. Success will also be measured by noting a reduction in the number of calls we receive regarding these circumstances.

## **Development of the Regulation**

### **7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

*If applicable, please include the date and medium by which the stakeholders were initially contacted.*

The Board established a task force to review Chapter 4725-5 and the draft revisions. Subsequently, the Board created a sub-committee, holding a public meeting to solicit stakeholder comments and review the current laws and rules that pertain to “offering services through authorized business entities.” Stakeholders were kept informed by board meeting agendas posted on the website during the review process. The Ohio Optometric Association was also present for discussion at the sub-committee and board meetings.

### **8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

The Board held a public hearing regarding the proposed rules being presented. Stakeholders in attendance included representatives from; the Ohio Optometric Association, LensCrafters, (Luxottica), Ohio Ophthalmological Association, Joint Committee on Agency Rule Review, Attorney General’s Office and Board members and staff.

An Attorney General’s Opinion has been received regarding the changes to these rules. The Attorney General states: “The State Board of Optometry may regulate the business or management aspects of the practice of optometry through the adoption and promulgation of administrative rules, but only to the extent that any rule or part thereof relates to activities or decisions that have a direct and significant effect on an optometric patient’s care or treatment.” (Opinion is included)

The Attorney General’s Opinion is based on an Ohio Supreme Court Case; *State ex rel. Bricker v. Buhl Optical Co.*, (1936).

*Id.* (syllabus, paragraph 2). The court held the following, that an optical company may not:

“(a) employ an optometrist to do optometrical work in connection with its business, (b) fill a prescription issued by an optometrist who is employed in its business to do optical or other legitimate work, (c) *exercise any control* over such an optometrist, as such, *in regard to his prices or charges or over the records of his office or any part of his optometrical work*, (d) advertise so as to lead the public to believe it is practicing optometry, nor (e) *practice optometry directly or indirectly.* (Emphasis added.)”

The Board also received a letter from attorneys on behalf of Luxottica Retail North America, Inc., who represents a vast majority of the general corporations (i.e., LensCrafters, Pearl Vision, Sears Optical, Costco Optical, Sam’s Club Optical, Walmart Optical).

The letter references the adverse impact they perceive should the proposed rule be enacted. A copy of this letter is included and is referenced in section 14.

**9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

Rules within this chapter are consistent with standards established by national organizations and other regulatory bodies that provide academic accreditation to institutions that offer Doctor of Optometry programs. Additional examples include the following:

**Texas Optometry's Bill of Rights Upheld in Court Decision vs. Walmart**

*September 2010*

***OPTOMETRISTS RECEIVE JURY VERDICT AGAINST WAL-MART FOR VIOLATIONS OF THE TEXAS OPTOMETRY ACT***

On August 24, 2010 a federal court jury returned a unanimous verdict in favor of four Texas licensed optometrists. The optometrists filed suit against Wal-Mart for violation of the Texas Optometry Act. The Act makes it illegal for commercial optical companies like Wal-Mart / Sam's Club who lease office space to optometrists next door to their optical stores to control or attempt to control the professional judgment and manner of practice of optometrists. The unanimous verdict found the optometrists' complaint that Wal-Mart's lease and business practices in Texas violate the Texas Optometry Act was valid.

The purpose of the Texas Optometry Act, as established by the Texas Legislature, is to safeguard the visual welfare of the public and the doctor patient relationship, and to prevent optical companies from interfering and damaging those important interests by interfering with the independent judgment of optometrists.

The evidence introduced during trial established Wal-Mart required all optometrists in the State of Texas leasing from Wal-Mart to list their days and hours of operation as a term of the lease and as a condition of obtaining and renewing their leases. Wal-Mart's Texas Form lease contained a provision which provided Wal-Mart with the option to terminate the optometrists' lease if the doctor deviated from the listed hours of operation. The four optometrists alleged that Wal-Mart violated the Act each day their days and hours of operation were listed in their leases.

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**No. 07-15050 567 F.3d 521; 2009 U.S. App. LEXIS 11416 - California**

“The appeals court ruled in favor of the State of California. Here through the challenged laws, California has sought to protect optometrists and ophthalmologists as health care professionals from being affected by subtle pressures from commercial interests.

The pressures of co-ownership and profit sharing prohibited by the statutes are more obvious, but potentially even a landlord-tenant relationship could undermine health care quality if the landlord required a certain level of performance to maintain the lease. It is true that an optometrist or ophthalmologist would still be bound by professional and ethical standards. However, it is the subtle pressure to conform to commercial desires that the statutes seek to avoid. These subtle pressures would be difficult to regulate as violations of professional or ethical standards. Thus, the California laws in this case are health regulations designed to prevent health care providers from being unduly affected by commercial interests. We must give deference to the State's choice to protect its citizens in this way.” (enclosed)

**10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

None. The proposed changes are only to better clarify existing regulations.

**11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

No. Again, these are just changes to better clarify existing regulations.

**12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

The proposed rule changes are not a duplication of an existing regulation. It is written to better clarify the existing rule, thus making it easier for the optometrist and the corporate entity to better understand and make them more effective in serving their patients.

**13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

Once the proposed rule changes are approved, the changes will be posted on the Board's website and they will be included in a packet of information when we have our next mailing to all of our licensees.

Board staff will also be available to respond to questions or concerns on a daily basis. We will also include the new changes in all of our law and rule reviews with the Ohio State University College of Optometry and any new licensees coming to Ohio.

## **Adverse Impact to Business**

**14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community;**

The scope of the impacted business community would be the optometrists who are currently in a lease agreement with a general corporation. Currently about 40% of the licensed optometrists in the State of Ohio lease space from a general corporation, while the other 60% have their own private practice.

**b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance);**

No adverse impact regarding fees, fines or employer time for compliance is anticipated. These proposed changes only bring clarity to the existing rules.

As referenced earlier in section #8, attorneys for Luxottica Retail North America submitted a letter with their perceived adverse impact if the proposed rule package was enacted. They list the following:

1. Increase the cost to Ohio consumers for optical products and optometric services
2. Limit and/or prevent optometrists from finding suitable space for their offices
3. Impose costs on Ohio retail optical companies arising from terminating and/or renegotiating current leases
4. Prevent optometrists and retail optical companies from generating new jobs and maintaining current ones

They also state in their letter that “the State of Ohio will also be directly impacted through a likely decrease in tax revenues and through the expenditure of hundreds of thousands of dollars incurred in defending court challenges to implementation of the Proposed New Rule.”

The Board disagrees with the above perceived adverse impact by Luxottica and answers to their concerns are as follows:

#1 – There are no anticipated increase to Ohio consumers. It’s business as usual. The corporations need the relationship with the optometrist and the optometrist needs the relationship with the corporation for both to be successful.

#2 – Same as #1, their reference to optometrists not finding suitable space is incorrect.

#3 – The leases the corporations use are renegotiated on a yearly basis and are constantly changing. There should be no anticipated cost increases from maintaining the leases, because they should be complying with the current rules.

#4 – Same as above. What’s necessary is that both parties have a professional relationship, which is mutually agreed upon when the contract is put in place.

Lastly, their reference regarding the State of Ohio losing tax revenue is unsubstantiated and should not occur with the proposed rule package being promulgated. It is possible that because of their threat of suing the State of Ohio that there will be costs related to defending the Board’s proposed rule package, but that is what this corporation typically does. They are currently involved in multiple lawsuits across the United States for just this very reason we are clarifying our current rules. Their actions are not about quality of health care, but about increasing sales volume. By the Board clarifying the current rules, it is protecting the patients and the optometrist from undue control.

In all of the Luxottica current leases, it lists the optometrist as an “Independent Contractor.” One of the most important considerations is the degree of control exercised by the company over the work of the workers in determining if they are actually an independent contractor. An employer has the right to control an employee. Thus, it is important to determine whether the company has the right to direct and control the workers not only as to the results desired, but also as to the details, manner and means by which the results were accomplished. For example, whether the company had the right to control the number and the frequency of breaks, how the workers performed their work, the type of equipment they could use, and their work schedule. If you find that the company had the right to supervise and control such details, and the manner and means by which the results were to be accomplished, such a finding would indicate an employer-employee relationship, which is in violation of the Ohio Revised Code. The proposed rule package will better clarify for the optometrist entering into the lease what to be aware of to remain an independent contractor to prevent that from happening.

Summary of specific objections to the Proposed New Rule:

- **4725-5-10(A)(1)** – “would prohibit an optometrist and retail company from agreeing on the hours of operation”

**4725-5-10(A)(1)** – states: “The direct or indirect control of the performance of optometric services” – Nothing in (A)(1) addresses hours of operation. The specific hours and days are negotiated when the lease is signed by the corporation and the optometrist.

- **4725-5-10(A)(1)(c)** – “prohibits optical companies from limiting or dictating third party payer agreements. As a result, optometrists will no longer participate in optical companies third party payer agreements.”

**4725-5-10(A)(1)(c)** – states: “Limiting or attempting to limit an optometrist’s participation in third party payer agreements” – The word “dictating” is not found in the proposed rule language. By having this language in the new rule, it would prevent “dictating” by the corporation.

- **4725-5-10(A)(1)(e)** – “the proposed new rule seems to prohibit an optical company from terminating a lease.”

**4725-5-10(A)(1)(e)** – states: “Terminating or threatening to terminate a lease with an optometrist as a means to control the professional judgment or practice of the optometrist” – While the intent of the language in this paragraph is obvious, their objection to this wording is correct. The Board has no authority over the corporation and the intent of the proposed rule package is not to gain authority over the corporation. The intent is for the public’s safety by better clarifying the current rules for the optometrists, so they can understand what they should consider before signing a lease with a general corporation. We have stricken this line from the proposed rule package.

- **4725-5-10(A)(1)(g)** – “the rule would potentially prohibit retail optical companies from ensuring that lessee optometrists do not compete directly with the company’s optical dispensary on its own property.”

**4725-5-10(A)(1)(g)** – states: “Restricting or attempting to restrict the scope of practice of an optometrist in a way that prevents the optometrist from providing the full range of diagnostic and treatment services authorized by Ohio law” – The language of this section of the proposed rule package isn’t about selling of optical goods or the optometrist competing with the corporation they are leasing from. If the corporation felt this was occurring, they could terminate the lease or include language in their lease regarding the selling of optical goods. The intent is to ensure the professional autonomy of the optometrist from the corporation, so that clinical decisions are not influenced and the patient’s safety is not jeopardized.

- **4725-5-10(B)** – “it is not within the Board’s statutory authority to engage in the setting of rent between two contacting parties or otherwise determine the fair market value of leased optometric practice space.”

**4725-5-10(B)** – states: “If an optometrist leases space from a general corporation or an unlicensed individual, the optometrist shall do so on a flat rate basis. The leasing of space by an optometrist from a general corporation or unlicensed individual in any manner other than on a flat rate basis is prohibited.” The proposed rule package says nothing about the Board “setting the rent” or “determine the fair market value.”

In their argument presented in this letter, they state a “worse-case scenario” that optometrists and their staff will have their leases terminated, which will cost them their jobs and income source. With approximately 40% of the licensed optometrists in the State of Ohio currently working with a general corporation under a flat rate lease, it would be ludicrous to believe the corporation would terminate their lease based on the proposed rule package. The rule package merely clarifies the existing rules. There would be no reason why any optometrist’s lease would be terminated.

In addition, they argue that the corporation would incur “hundreds of thousands of dollars to redo their respective leases in order to achieve compliance with the proposed rule. In the event of litigation with optometrists regarding changes to current leases, the estimated cost is a minimum of \$100,000.” Luxottica maintains lease agreements with varying language throughout the United States, due to each state’s laws and rules regarding practicing under unlicensed control. If one reviews our current rules relating to the proposed changes it is clear that no leases should require any renegotiating.

**Current Rules: (summary)**

**4725-5-06** – Splitting of Fees states: “An optometrist working in a general corporation cannot be paid by the hour, on a percentage basis or by splitting the examination fee”

“The professional fee paid for services rendered must go to the optometrist.”

If an optometrist leases space from a general corporation, the optometrist must do so on a flat rate basis. The licensee is responsible for negotiating and maintaining a proper lease relationship with unlicensed entities. The intent of this rule is to maintain the licensee’s professional autonomy from the corporation. This ensures that corporation objectives do not influence clinical decisions and the licensee’s primary responsibilities to the patient.”

By promulgating the proposed rule package, it will provide better clarity for the optometrist prior to entering into a lease with a general corporation and will ensure quality patient care without undue influence.

**c. Quantify the expected adverse impact from the regulation.**

*The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.*

There has been the threat of legal action from a large corporation in the past if the board chose to move forward with the proposed changes. This was prior to receiving the Attorney General’s Opinion. This threat goes hand-in-hand with the control the corporations are trying to obtain over the optometrist and it is obvious this control is not in the best interest of the patient, but is about money.

In the Board’s eyes, there is no adverse impact in terms of dollars. The proposed changes provide clarity to the existing rules, which will better protect the citizens of Ohio by ensuring quality patient care at all times.

**15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

It is very important to emphasize that the Board is making this clarification to the current rules in an attempt for all persons involved in this matter to comply with the Ohio Supreme Court ruling that the Attorney General based their opinion on. Some of the actual verbiage used in the existing rule came directly from that Court ruling. The Board relied on this Supreme Court ruling when they wrote the original rules for the practice of optometry. Although the court ruling may be dated, it comes from Ohio’s top court and it still has great relevance to the proposed rule package. It seems vitally important to comply with an Ohio Supreme Court ruling and the Board is attempting to assist all persons in that very endeavor by clarifying the existing rule.

The Board’s legislative mandate is to provide for public protection. The intent is for all optometrists to remain independent serving the citizens keeping patient care “above the dollars,” not allowing big business to interfere by governing the optometrist with demands about scheduling, what insurance policies to accept, etc., thus reducing patient care and creating a potentially unsafe environment.

The optometrists are small business owners, paying taxes, having employees, etc., whether leasing from a general corporation or having their own private practice. It is important that they (optometrists) remain independent, protecting the citizens and providing the best patient care.

The board is acutely aware of the corporate interests and in no way wishes to hamper their business model, but the only intent is to empower the optometrist to better manage their small business thus providing the necessary patient care ensuring the corporation will better benefit from the process.

The proposed changes will ensure the independence and autonomy of the optometrist and allow the profession to remain intact.

### **Regulatory Flexibility**

**16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

There are no exemptions in the rules, however, the proposed changes are being submitted to better clarify the existing rule, thus making it easier for the optometrist to better understand and make them more effective in serving their patients.

**17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

The proposed rule changes do not necessarily impose fines or penalties. The Board generally applies the ORC section 119.14 waiver provision to all optometric programs, including those that meet the definition of “small business” as defined in paragraph (G)(1) of that section.

**18. What resources are available to assist small businesses with compliance of the regulation?**

The Board conducts regular laws & rules training to new optometrists, including graduating classes at the Ohio State University College of Optometry and all optometrists who are newly licensed in Ohio. The Board staff is readily available to respond to any questions or concerns regarding the leasing of space. In addition, small businesses can readily obtain information from the Board website at [www.optometry.ohio.gov](http://www.optometry.ohio.gov). The Board also provides a dedicated email address and phone number to be used for questions ([Optometry.Board@exchange.state.oh.us](mailto:Optometry.Board@exchange.state.oh.us) and 614-466-5115).