

RULES AND REGULATIONS
FOR CONDUCTING
CRIMINAL RECORD CHECKS
FOR EMPLOYEES OF
LONG TERM CARE FACILITIES

Arkansas Department of Health and Human Services

Division of Medical Services

Office of Long Term Care

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AUTHORITY

The following rules and regulations for the requirement of criminal record checks for certain employees of long term care facilities in the State of Arkansas are duly adopted and promulgated by the Arkansas Department of Health and Human Services, Division of Medical Services, Office of Long Term Care, pursuant to the authority expressly conferred by Arkansas Code Ann. §20-33-201 et seq. (Act 990 of 1997, Act 1467 of 1999, Act 1409 of 1999, Act 1710 of 2001, Act 1382 of 2003, Act 1393 of 2003 and Act 1087 of 2003).

If any provisions of these rules and regulations, or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application, and to this end the provisions hereof are declared severable.

Individuals and qualified entities are immune from suit or liability for damages for acts or omissions, other than malicious acts or omissions, occurring in the performance of duties imposed by Act 990 of 1997.

"The Arkansas Department of Health and Human Services is in compliance with Titles VI and VII of the Civil Rights Act and operated, managed and delivers services without regard to age, religion, disability, political affiliation, veteran status, sex, race, color or natural origin."

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100 DEFINITIONS

As used in these regulations the following definitions shall apply unless the policy clearly states otherwise.

Bureau - The Identification Bureau of the Department of the Arkansas State Police.

Care - The treatment, services, assistance, education, training, instruction or supervision for which the care-giving person or entity is reimbursed either directly to or by arrangement with a qualified entity or receives reimbursement or payment either directly or indirectly from Medicaid.

Determination - The licensing agency's determination that an applicant or employee is or is not disqualified from employment, or that a qualified entity is disqualified from licensure, based on the criminal history of the employee or operator.

Elderly - Persons aged 65 years or older.

Employee - Any person who provides care to the elderly or to individuals with disabilities or both on behalf of, under the supervision of, or by arrangement with a qualified entity or any person employed by a qualified entity, including persons provided by or pursuant to contract with a private placement agency or contract staffing agency, unless the person is a family member, a volunteer or works in an administrative capacity and does not provide direct patient care. For purposes of these rules and regulations, "employee" includes persons provided by or pursuant to contract with an outside vendor who provide care with access to residents in long term care facilities.

Employment Clearance Registry (ECR) – An automated voice response database system maintained by the Office of Long Term Care of previously conducted criminal record checks that result in the employment disqualification of an individual. This database also contains employment disqualification information on individuals based on substantiated administrative findings of patient abuse, neglect or theft against employees of long term care facilities.

Individuals with Disabilities - Persons with a mental or physical impairment who require assistance to perform one or more of the following tasks of daily living; feeding, mobility, toileting, or medication.

Index - The database maintained by the Bureau of criminal record checks that have been conducted on applicants for employment with, and employees of, or operators of qualified entities.

Licensing Agency - The government agency (Department of Health and Human Services/Division of Medical Services/Office of Long Term Care) charged with licensing

the operator or qualified entity to provide care to the elderly or to individuals with disabilities or both.

National Criminal History Check - A review of national criminal records maintained by the Federal Bureau of Investigation (FBI) based on fingerprint identification or other positive identification methods.

Operator - A person responsible for signing an application for an initial or renewal license to operate a qualified entity.

Qualified Entity - A long term care facility as defined by A.C.A. § 20-10-101 or 20-10-702; "...a nursing home, residential care facility, post-acute head injury retraining and residential care facility, or any other facility which provides long term medical or personal care" whether or not the entity has applied for or possesses any license necessary for operation. Note: Additional qualified entities covered by Ark. Code Ann. § 20-33-201 et seq. include home health agencies and hospice providers. These qualified entities shall be performing their criminal record checks through their licensing agency, the Arkansas Department of Health and Human Services/Division of Health Facility Services. Also covered are individuals or entities who provide services designated as Elderchoices providers. These qualified entities shall be performing their criminal record checks through the Department of Health and Human Services/Division of Aging and Adult Services.

Report - A statement of the criminal history of an applicant, employee, or operator issued by the Bureau.

State Criminal History Check - A review of state criminal records conducted by the Identification Bureau of the Arkansas State Police.

200 IMPLEMENTATION

201 Effective October 1, 1997, long term care facilities shall not knowingly employ or hire a person who has been found guilty or has pled guilty or nolo contendere to any of the offenses listed below by any court in the State of Arkansas or any similar offense by a court in another state or of any similar offense by a federal court.

1. Capital murder, as prohibited in A.C.A. § 5-10-101;
2. Murder in the first degree and second degree, as prohibited in A.C.A. § 5-10-102 and 5-10-103;
3. Manslaughter, as prohibited in A.C.A. § 5-10-104;
4. Negligent homicide, as prohibited in A.C.A. § 5-10-105;
5. Kidnapping, as prohibited in A.C.A. § 5-11-102;
6. False imprisonment in the first degree, as prohibited in A.C.A. § 5-11-103;
7. Permanent detention or restraint, as prohibited in A.C.A. § 5-11-106;
8. Robbery, as prohibited in A.C.A. § 5-12-102;

9. Aggravated robbery, as prohibited in A.C.A. § 5-12-103;
10. Battery , as prohibited in A.C.A. § 5-13-201, 5-13-202, and 5-13-203;
11. Aggravated assault, as prohibited in A.C.A. § 5-13-204;
12. Introduction of controlled substance into body of another person, as prohibited in A.C.A. § 5-13-210;
13. Terroristic threatening in the first degree, as prohibited in A.C.A. § 5-13-301;
14. Rape or carnal abuse in the first degree, second degree, and third degree, as prohibited in A.C.A. § 5-14-103 - 5-14-106;
15. Sexual assault in the first degree, second degree, third degree and fourth degree, as prohibited in A.C.A. §§ 5-14-124 – 5-14-127 or sexual abuse in the first degree and second degree, as prohibited in A.C.A. § 5-14-108 and 5-14-109;
16. Sexual indecency with a child, as prohibited in A.C.A. § 5-14-110 or sexual solicitation of a child, as prohibited in A.C.A. § 5-14-110;
17. Violation of a minor in the first degree and second degree, as prohibited in A.C.A. § 5-14-120 and 5-14- 121;
18. Incest, as prohibited in A.C.A. § 5-26-202;
19. Offenses against the family, as prohibited in A.C.A. § 5-26-303 - 5-26-306;
20. Endangering the welfare of incompetent person in the first degree, as prohibited in A.C.A. § 5-27-201;
21. Endangering the welfare of a minor in the first degree, as prohibited in A.C.A. § 5-27-203;
22. Permitting child abuse, as prohibited in subdivisions (a)(1) and (a)(3) of A.C.A. § 5-27-221;
23. Engaging children in sexually explicit conduct for use in visual or print media, transportation of minors for prohibited sexual conduct, or pandering or possessing visual or print medium depicting sexually explicit conduct involving a child, or use of a child or consent to use of a child in a sexual performance by producing, directing, or promoting a sexual performance by a child, as prohibited in A.C.A. § 5-27-303, 5-27-304, 5-27-305, 5-27-402, and 5-27-403;
24. Felony adult abuse, as prohibited in A.C.A. § 5-28-103;
25. Theft of property, as prohibited in A.C.A. § 5-36-103;
26. Theft by receiving, as prohibited in A.C.A. § 5-36-106;
27. Arson, as prohibited in A.C.A. § 5-38-301;
28. Burglary, as prohibited in A.C.A. § 5-39-201;
29. Felony violation of the Uniform Controlled Substances Act, as prohibited in A.C.A. § 5-64-401;
30. Promotion of prostitution in the first degree, as prohibited in A.C.A. § 5-70-104;
31. Stalking, as prohibited in A.C.A. § 5-71-229;
32. Criminal attempt, criminal complicity, criminal solicitation, or criminal conspiracy, as prohibited in A.C.A. § 5-3-201, 5-3-202, 5-3-301, and 5-3-401, to commit any of the offenses listed in this section.
33. Forgery, as prohibited in A.C.A. § 5-37-201;
34. Breaking or entering, as prohibited in A.C.A. § 5-39-202;
35. Obtaining a controlled substance by fraud, as prohibited in A.C.A. § 5-64-403;
36. Computer child pornography, as prohibited in A.C.A. § 5-27-603; and

37. Computer exploitation of a child in the first degree, as prohibited in A.C.A. § 5-27-605.

201.1 Except as provided in Section 201.2 below, a conviction for an offense listed in Section 201 shall not disqualify an employee or applicant for employment if the date of conviction of the offense is at least ten (10) years from the date of the application for the criminal record check pursuant to these regulations and the individual has no criminal convictions of any type or nature during the ten-year period.

201.2 Because of the serious nature of the offense and close relationship to the type of work that is to be performed, the following shall result in permanent disqualification of employment:

1. Capital murder, as prohibited in A.C.A. § 5-10-101;
2. Murder in the first and second degree, as prohibited in A.C.A. §§ 5-10-102 and 5-10-103;
3. Kidnapping, as prohibited in A.C.A. § 5-11-102;
4. Rape or carnal abuse in the first, second and third degree, as prohibited in A.C.A. §§ 5-14-103 – 5-14-106;
5. Sexual assault in the first degree and second degree, as prohibited in A.C.A. §§ 5-14-124 and 5-14-125 or sexual abuse in the first and second degree, as prohibited in A.C.A. §§ 5-14-108 and 5-14-109;
6. Endangering the welfare of an incompetent person in the first degree, as prohibited in A.C.A. § 5-27-201;
7. Felony adult abuse, as prohibited in A.C.A. § 5-28-103; and
8. Arson, as prohibited in A.C.A. § 5-38-301.

201.3 Whenever a criminal record check is performed on a person under the provisions of these regulations, the person will be disqualified for employment, licensure, or any other purpose if it is determined that the person committed a violation of any sexual offense formerly proscribed under Arkansas Code §§ 5-14-101 through 5-14-127 (prior to July 2003) that is substantially equivalent to any sexual offense presently listed in Arkansas Code §§ 5-14-101 through 5-14-127 and is an offense screened for in a criminal record check. These include the criminal offenses listed in these regulations in Section 201 as follows:

14. Carnal abuse in the first degree, second degree and third degree, as prohibited in A.C.A. § 5-14-106;
15. Sexual abuse in the first degree and second degree, as prohibited in A.C.A. § 5-14-108 – 5-14-109;
16. Sexual solicitation of a child, as prohibited in A.C.A. § 5-14-110;
17. Violation of a minor in the first degree and second degree, as prohibited in A.C.A. §§ 5-14-120 and 5-14-121.

202 Criminal record checks shall be conducted on all current operators and incumbent employees by October 1, 2000, and conducted periodically as follows:

1. All current operators shall be required to obtain a criminal record check in conjunction with the deadline for the renewal of the long term care facility's license;

Note: This provision was implemented during the facility licensure renewal effective July 1, 1998. This provision shall only apply to the first license renewal effective July 1, 1998, and not to subsequent licensure renewals unless the applicable operator had not had a criminal record check conducted at that time and provided that the operator has served continuously in a position as an operator with no more than a 60 calendar day interruption in such service. (See Section 400)

2. Incumbent employees employed as of October 1, 1997, shall apply for criminal record checks in the same manner as new employment applicants either in conjunction with the employee's anniversary of employment, any time before that date or in any time frame to ensure a minimum of one-third of the facility's applicable workforce have criminal record checks conducted per year beginning October 1, 1997 and have completed all criminal record checks on incumbent employees by October 1, 2000.

3. Periodic criminal record checks shall be performed on all applicable employees on an ongoing basis. After October 1, 2000, each long term care facility shall implement a schedule to conduct criminal record checks on applicable employees so that no applicable employee exceeds five (5) years without a new criminal record check.

203 Operators licensed and employees hired on or after October 1, 1997 shall be subject to a criminal record check.

203.1 Nursing assistant trainees shall be subject to a criminal record check under the following provisions:

1. Prior to a nursing home placing a person in a facility-based nursing assistant training program or sponsoring a person in a non-facility-based training program, the facility shall conduct a criminal record check on the person. This is based on the requirement that a job offer has been made to the person to be an employee of the facility, an on-call employee of the facility or sponsored through an intent to employ by the nursing home.
2. Nursing assistants who have received training as an independent student and not connected to an employment offer as discussed in #1 above will be subject to a criminal record check at the time an employment offer has been made by any type of long term care facility.

Note: The above requirements do not apply to independent (non-employment status) trainees performing clinical training in a long term care facility. Clinical training does not involve the provision of "care" as that term is defined herein. Trainees, independent of an

employment connection to a facility, are not required to have a criminal record check. However, nursing assistant trainees who are employed while still in training and used by a facility to provide care are subject to a criminal record check.

204 When a long term care facility determines the need to utilize temporary employees as provided by a private placement agency, contract staffing agency or contract for care provided by an outside vendor, it shall be the responsibility of the private placement agency, contract staffing agency or outside vendor to initiate the criminal record check as provided by these regulations prior to the placement of the person in the long term care facility. The process to implement this provision is as follows:

1. When a long term care facility determines the need to utilize a private placement agency, contract staffing agency or contract for care provided by an outside vendor, the long term care facility shall notify such agency/vendor to contact the Office of Long Term Care for inclusion in the process to conduct criminal record checks as specified in these regulations.
2. Upon contact by a private placement agency or contract agency/vendor as defined above, the Office of Long Term Care shall issue the necessary packet containing the regulations, forms, and numerical code to the agency/vendor to conduct criminal record checks in accordance with these regulations.
3. The private placement agency or contract agency/vendor shall initiate criminal record checks on applicable employees as prescribed in Section 300 of these regulations. The Office of Long Term Care shall issue the "determination letter" to the agency/vendor.
4. Upon the assignment of a person to work in a long term care facility, the long term care facility must obtain a copy of the person's determination letter from the private placement agency or contract agency/vendor to verify compliance with this provision prior to the placement to work in the facility.
5. Criminal record checks on persons assigned from private placement agencies or contract agencies/vendors must comply with the twelve month time limit provision specified in Section 501 of these regulations. These persons are not eligible for the incumbent employee provisions in Section 202(2) or the periodic record check provisions in Section 202(3) and shall be subject to yearly criminal record checks. Each long term care facility must establish a procedure for periodically reviewing at least annually documentation provided pursuant to #4 above.

205 Criminal record checks as required in these regulations shall include both a state and national record check. A "state only" criminal record check is allowed if the facility can verify either of the following:

1. The applicant has been employed in the State of Arkansas to provide care to the elderly or individuals with disabilities or both within sixty (60) calendar days before the application;

2. The applicant has lived continuously in the State of Arkansas for the past five (5) years.

Note: Examples of evidence that can be used to verify the above may include, but not limited to, employment records, payroll check stubs, tax records, rent/house payment records, utility bills, school records, etc. Facilities shall maintain copies of such verification evidence in cases where a state only criminal record check was conducted.

206 If requested, each employee who has had a criminal record check conducted pursuant to these regulations has a right to obtain a copy, from the initiating entity, of the report issued by the Identification Bureau and a copy of the determination letter issued by the Office of Long Term Care. In all criminal record checks resulting in the disqualification of an individual, a copy of the determination letter issued by the Office of Long Term Care must be provided to the individual by the facility. This provision shall apply in all cases, regardless of the payment source of the fee(s).

207 A person may challenge the completeness or accuracy of criminal history information issued by the Bureau. The Office of Long Term Care shall make determinations based on the information obtained from the Bureau and shall not be responsible for allegations regarding the disposition, expungement or accuracy of the information. The process for the applicant, employee or operator to challenge the record is as follows:

1. Any challenges to the accuracy of the report should be directed first to the State Identification Bureau (501) 618-8500, #1 State Police Plaza Drive, Little Rock, Arkansas 72209;
2. A person, upon positive verification of his or her identity, may review criminal history information pertaining to such person compiled and maintained by the Identification Bureau or the central repository and may challenge the completeness or accuracy of such information;
3. The criminal history information may be reviewed only by the subject, or by the subject and his/her attorney, or the subject's attorney authorized in writing by the subject;
4. If the subject, after appropriate review, believes that the records are incorrect or incomplete in any way, he/she may request an examination and correction of the records by the agency responsible for the records;
5. Should it be determined as a result of the challenge that the criminal history information is inaccurate, incomplete, or improperly maintained, that information shall be appropriately corrected;
6. Immediately thereafter, the agency responsible for the records shall notify every agency or person known to have received this information within the previous one-year period and provide them with corrected information;

7. A person whose record has been corrected shall be entitled to ascertain the names of those agencies or individuals known to have received the previously incorrect criminal history information; and

8. The right of a person to review his/her criminal history record shall not be used by a prospective employer or others as a means to circumvent procedures or fees for accessing records for non-criminal justice purposes.

208 All reports obtained under these regulations are confidential and are restricted to the exclusive use of the Arkansas Crime Information Center, the Bureau, the licensing agency and the person who is the subject of the report. The information contained in reports shall not be released or otherwise disclosed to any other person or agency except by court order and are specifically exempt from disclosure under the Arkansas Freedom of Information Act (A.C.A. 25-19-101, et seq.), except that the Department of Health and Human Services/Office of Long Term Care is authorized and directed to furnish "determinations" to long term care facilities.

Note: Act 1109 of 1993 (Ark. Code Ann. § 12-12-1013) states that criminal history information may be provided to the subject, the subject's attorney or other designee authorized in writing by the subject.

209 Each long term care facility shall maintain on file, subject to inspection by the Arkansas Crime Information Center, the Bureau, or the licensing agency, evidence that criminal record checks have been initiated on all applicable operators and employees, and a copy of the determinations received from the Office of Long Term Care. The facility shall monitor all pending criminal record check applications to ensure results are received within 30 calendar days for a state record check and 120 calendar days for a national (FBI) record check. The facility shall make all efforts to resolve pending applications that exceed these timeframes and shall document those efforts. For persons assigned from an applicable private placement agency or contracted agency/vendor, the facility shall maintain on file copies of the determination letter issued by the Office of Long Term Care

300 APPLICATION PROCESS FOR EMPLOYEES

301 A criminal record check must be conducted when a person applies for a position as an employee, as defined by these regulations, and the long term care facility intends to make an offer of employment to the applicant. The same process as described in this section shall also be used when incumbent employee's names are submitted for criminal record checks as required by Section 202 of these regulations.

302 The Office of Long Term Care shall maintain an employment clearance registry database (ECR) of previously conducted criminal record checks on applicants of long term care facilities that resulted in an employment disqualification determination. The employment clearance registry (ECR) shall also contain certification information for

nursing assistants, plus administrative findings of abuse/neglect/theft and employment restriction information for nursing assistants, various employees and job applicants.

The employment clearance registry (ECR) shall be available for inquiries by telephone through an automated voice response system, or by computer access to an online website system. The telephone number to the automated voice response system and the URL address to the online website system shall be issued by the OLTC, or its designated agent, and may be subject to change. If needed, facilities should contact the OLTC for the latest contact information for either system.

Both systems shall be available 24 hours per day, seven days per week (except for scheduled maintenance or at times of technical problems). Past disqualification determinations shall be entered onto the ECR by the person's name and Social Security Number. The process to check the ECR shall be as follows:

1. At the time the facility intends to make an offer of employment to an applicant and prior to submitting any forms for a criminal record check, the facility shall contact the ECR either by telephone or online.
2. The facility shall enter their four-digit "Registry Identification Number" assigned to all facilities by the Office of Long Term Care.
3. For the auto-voice response system, the facility shall search by the applicant's Social Security Number. For the online system, the facility shall search by either the applicant's SSN or CNA certification number.

NAME SEARCHES ARE NOT POSSIBLE ON THE AUTOMATED VOICE RESPONSE SYSTEM. NAME SEARCHES ARE POSSIBLE ON THE ONLINE SYSTEM BUT ACCURACY IS NOT ASSURED. NAME SEARCHES MAY ALSO BE OBTAINED BY CALLING THE OLTC. PLEASE NOTE, HOWEVER, THAT NAME SEARCHES DO NOT GENERATE A VERIFICATION LOG OF THE CLEARANCE. THEREFORE, FACILITIES SHALL AVOID THE USE OF NAME SEARCHES WHEN THE NEED FOR DOCUMENTATION AND ACCURACY OF THE REGISTRY CHECK IS REQUIRED.

4. For the auto-voice system, if no disqualification record exists, the voice prompts shall respond as follows:
 - a. For non-nursing assistants, "That number is not found in our records".
 - b. For nursing assistants, "Certification is in good standing".
Note: For nursing assistants, the ECR shall provide certification status information prior to employment restriction status.

For the online system, if no disqualification record exists, the display screen shall respond as follows:

- c. For non-nursing assistants, "Inquiry Status - Not Found".
- d. For nursing assistants, "Inquiry Status - Found" and shall display the individual's certification status and indicate in another field that the individual does not have any employment restrictions.

The online system shall also provide the inquiring facility the ability to print a report of the search and results. Facilities shall be required to print the registry clearance report document and maintain this report in the applicant's or employee's file.

Either statement quoted above means that there have not been previous employment restrictions listed for that person. See Section 303 through 306 for further process instructions if no employment restriction was listed.

5. If a disqualification determination record does exist (for either nursing assistants or other employees), the auto-voice system shall repeat the persons name and state "Unable to provide employment clearance, please hold for transfer". The caller is then transferred, during normal business hours, to staff at the Office of Long Term Care for further details. If calling after normal hours, the caller will be advised to call back during normal hours if further details are desired.

For the online system, if a disqualification record does exist (for either nursing assistants or other employee positions), the system shall display "Inquiry Status – Found" and display on screen the results showing the employment restriction and direct the inquiring facility to contact the Office of Long Term Care for further details. Facilities shall be required to print the registry report document and maintain this report in the applicant's or employee's file.

6. Applicants with past disqualification determinations are ineligible for further employment unless a waiver* has been granted. The facility has no further actions to make if the applicant has been previously disqualified for employment and has not been granted a waiver. If employment is offered to a person who has been granted a waiver, the facility shall conduct or have evidence of a current criminal record check in the same manner as if hiring a person who has no previous criminal history (see Sections 303 through 306).

*Note: Waivers, as discussed in this context, shall include only those waivers granted from October 1, 1997 through October 1, 2001. Effective October 1, 2001, waivers will not be granted and the waiver process described in Section 600 is no longer available.

303 If, after checking the ECR (either the auto-voice system or online) maintained by the Office of Long Term Care, there was no previous disqualification determination listed on the applicant, the facility shall have the applicant complete a criminal record check form (DMS-736, issued by the Office of Long Term Care) if the facility intends to offer employment. Within five (5) working days of completion of the form, the facility shall forward the form and appropriate fee(s) to the Arkansas State Police/Identification Bureau

requesting a state record check and, if applicable, a national FBI records check. The facility must maintain a copy of the DMS-736 for verification of compliance (see Section 210). If a national record check is required, the applicant must also submit the appropriate fingerprint card. Fingerprint cards shall be available from the Office of Long Term Care and must have the required identifier number code assigned by the FBI prior to completion.

304 Upon receipt of a correctly completed criminal record check form and appropriate fee(s), the Bureau shall review their index of previously submitted criminal record checks for persons caring for the elderly or individuals with disabilities. Within three (3) working days of receipt of a request, the Bureau shall notify the facility if the Bureau's index contains any criminal history records on the applicant. Any previously listed criminal records on the applicant shall be forwarded to the Office of Long Term Care for a determination to be made regarding disqualification based on the offenses listed in Section 201 of these regulations.

305 After employment clearance is obtained from the ECR maintained by the Office of Long Term Care and the person has not listed prior criminal convictions on the DMS-736 form, a facility may make an offer of temporary employment to an applicant or continued employment to an incumbent employee while waiting for the official criminal record check results. If no criminal records regarding the applicant are found in the Bureau's index, then the facility may continue to temporarily employ the applicant/employee while the Bureau conducts a complete criminal record check. **If a criminal record does exist on the Bureau's index report, the applicant/employee is disqualified from further employment until the Office of Long Term Care makes a determination of employment eligibility.** If the Office of Long Term Care issues a determination that the applicant is not disqualified, the facility may continue to offer temporarily employment to the applicant/employee while the Bureau conducts a complete record check. Facilities may choose to deny the applicant/employee unsupervised access to a person to whom the facility provides care until the criminal record check and determination of employment status have been completed.

306 Upon completion of the criminal record check on an applicant or employee, the Bureau shall issue a report to the Office of Long Term Care. The Office of Long Term Care shall determine whether the applicant or employee is disqualified from employment and issue its determination to the facility. If the applicant or employee is disqualified from employment the facility shall terminate the employment of the employee or deny employment to the applicant.

307 After receipt of a request for a criminal record check, the Bureau shall make reasonable efforts to respond to requests for state criminal records within 20 calendar days and to respond to request for national records checks within 10 calendar days after receipt of a report from the FBI.

400 APPLICATION PROCESS FOR OPERATORS

401 When an operator applies for a license to operate a long term care facility, the operator shall complete a criminal record check form (DMS-736) and FBI fingerprint card obtained from the Office of Long Term Care. The forms and appropriate fees shall be submitted to the Office of Long Term Care attached to the application for licensure of the facility. Upon the determination that an applicant has submitted all necessary information for licensure, the Office of Long Term Care shall forward the criminal record check request form and fee payments to the Arkansas State Police/Identification Bureau. Upon completion of the state and national record checks, the Bureau shall issue a report to the Office of Long Term Care for a determination whether the operator is disqualified from licensure. The determination results shall be forwarded to the facility seeking licensure.

402 The requirement for a criminal record check for an operator shall only apply to the first application signed by an operator provided that the operator has served continuously in a position as an operator with no more than a 60 calendar day interruption in such service. Upon the yearly licensure renewal of a long term care facility, the operator signing the renewal application shall not be subject to a criminal record check unless the operator had not previously been subject to a criminal record check conducted pursuant to these regulations and provided that the operator has served continuously in a position as an operator with no more than a 60 calendar day interruption in such service.

403 The Office of Long Term Care shall issue a 45 calendar day provisional license to a long term care facility whose operator has been determined to be disqualified based on these provisions. A long term care facility that is issued a provisional license based on the criminal record disqualification of the operator may resubmit the application for licensure with a new operator. The new application must have evidence of submission of criminal record check for the new operator. If the facility does not resubmit the correctly completed application within 15 calendar days of the issuance of the provisional license, then the facility's license shall be immediately denied or revoked.

404 If an operator or long term care facility fails or refuses to cooperate in obtaining criminal record checks, such circumstances shall be grounds to deny or revoke the facility's license or operating authority, provided that the process of obtaining criminal record checks shall not delay the process of the application for a license or other operating authority.

500 EXCEPTIONS/EXCLUSIONS

501 Any person who submits evidence of having maintained employment in the State of Arkansas for the past 12 months and of successfully completing a criminal record check within the last 12 months or in accordance with that person's professional license shall not be required to apply for a new criminal record check. Copies of the previous criminal record check and determination letter issued by the Office of Long Term Care must be

maintained by the facility for verification of this provision. These persons shall be subject to the same periodic rechecks as other employees as described in Section 202.

Note: The acceptance of a previously conducted criminal record check is contingent upon compliance with provisions set forth in Act 990 of 1997, as amended. All provisions, such as the requirement for a national FBI record check, must have been completed, if applicable. The criminal record check must have been processed and a determination of employment status made by the applicable licensing agency as defined in Act 990 of 1997, as amended.

502 The requirement for a criminal record check under these regulations shall not apply to persons who render care subject to professional licenses obtained for the following occupations:

1. Licensed professional counselors;
2. Social Workers;
3. Dentists;
4. Registered or licensed practical nurses;
5. Occupational therapists;
6. Pharmacists;
7. Physical therapists;
8. Physicians and surgeons;
9. Podiatrists;
10. Psychologists and psychological examiners; or
11. Speech-language pathologists and audiologists.

503 A long term care facility shall not be disqualified from licensure when the operator has been found guilty of or has pled guilty or nolo contendere to a **misdemeanor** if the offense did not involve exploitation of an adult, abuse of a person, neglect of a person, theft, or sexual contact.

504 An applicant or employee shall not be disqualified from permanent employment when the applicant or employee has been found guilty of or has pled guilty or nolo contendere to a **misdemeanor** if the offense did not involve exploitation of an adult, abuse of a person, neglect of a person, theft, or sexual contact.

600 WAIVERS

601 For the period from October 1, 1997 through October 1, 2001, the Office of Long Term Care offered a waiver process to individuals who had been disqualified from employment based on their criminal history. Pursuant to Act 1710 of 2001, the Office of Long Term Care is prohibited from granting waivers. For purposes of these regulations, effective October 1, 2001, waivers will not be granted and the previous waiver process will no longer be available. However, previously granted waivers shall remain in affect unless revoked as described in Section 604 of these regulations.

602 If the employment disqualification has been previously waived, the individual's status on the employment clearance registry (see Section 300) shall continue to list the individual with a disqualification. The inquiring party shall be transferred to staff at the Office of Long Term Care to receive additional information regarding the waiver approval.

603 A facility is not obligated to employ or offer permanent employment to an applicant, or retain an employee who has been granted a waiver. If employment is offered to a person who has been granted a waiver, the hiring facility shall conduct a current criminal record check to determine if additional convictions exist since the waiver was initially granted. Incumbent employees who have been previously granted a waiver shall continue to be subject to the periodic criminal record checks as described in these regulations and shall be subject to the provisions of this section.

604 Any further criminal convictions of any nature or substantiated administrative findings of abuse, neglect or theft shall be grounds to revoke a waiver. A person who has a waiver revoked shall not be eligible for another waiver.

700 SANCTIONS/PENALTIES

701 A long term care facility that violates or fails to comply with requirements to obtain and maintain on file documentation of criminal record checks as specified in these regulations shall be assessed civil money penalties or shall be grounds to deny or revoke the facility's license. The decision regarding penalties shall be made by the Director of the Office of Long Term Care. The Director, in his/her discretion, may elect to assess the penalties as outlined in these regulations or may allow a specified period of time for correction of said violation(s).

702 In determining whether a penalty is to be assessed and in affixing the type and/or amount of monetary penalty, the Director shall consider:

1. The gravity of the violation including the probability that death or serious physical harm to a resident will result or has resulted;
2. The severity and scope of the actual or potential harm;
3. The extent to which the provisions of the applicable statutes or regulations were violated;
4. The "good faith" exercised by the facility. Indications of good faith include, but not limited to:
 - a. Awareness of the applicable statutes and regulations and reasonable diligence in securing compliance;

- b. Prior accomplishments manifesting the facility's desire to comply with the requirements;
- c. Efforts to correct; and
- d. Any other mitigating factors in favor of the facility.

703 Violations or failures to comply with these requirements are subject to a Class C civil penalty as described in the "Fines and Sanctions" sections of the long term care facility licensure manual (Section 1000 - 1900) and Appendix B of the residential care facility licensure manual. All Class C violations shall be based on a point system as contained in "Fines and Sanctions" sections in the facility's licensure manual. Class C violations are subject to a civil penalty not to exceed five hundred dollars (\$500) for each violation. Each subsequent Class C violation within a six-month period from the first violation shall subject the facility to a civil penalty double that of the preceding violation until a maximum of one thousand dollars (\$1,000) per violation is reached.

704 Notifications of violations and any subsequent hearings shall conform with such provisions as outlined in the "Fines and Sanctions" licensure regulations as listed above.

705 Any unlicensed long term care facility violating these regulations shall be guilty of a Class A misdemeanor for each violation.

800 APPEALS

801 Administrative hearings are available to persons, herein referred to as petitioners, who disagree with determinations of employment or licensure disqualification made by the Office of Long Term Care as described in these regulations. These provisions do not apply to a person's challenge of the record obtained from the Bureau (see Section 207 of these regulations).

802 When a petitioner wishes to appeal, he/she may do so by mailing a written notice of appeal to Appeals and Hearings (Slot 1001), Office of Chief Counsel, Arkansas Department of Health and Human Services, P.O. Box 1437, Little Rock, Arkansas 72203. The notice shall be mailed by certified mail, return receipt requested. The notice of appeal shall state the following:

- 1. Name of the petitioner;
- 2. Address of the petitioner;
- 3. Date of birth of the petitioner;
- 4. Phone number, if any, of the petitioner;

5. The petitioner's place of employment;
6. A short statement explaining why the petitioner believes the determination/decision is in error.

803 The notice of appeal must be received within 30 calendar days from the mailing date of the notification document of the determination of employment disqualification or waiver denial. No appeal shall be accepted prior to such a determination/decision.

804 A hearing shall be conducted by the Appeals and Hearings Section, Office of Chief Counsel, Department of Health and Human Services. The procedures to conduct the hearing are as follows:

1. The hearing record will contain all documents, exhibits and testimony admitted into evidence by the hearing officer. Within 20 calendar days of receipt of notice that a petitioner has requested a hearing, the petitioner and the Office of Long Term Care will prepare a file to be submitted to the Appeals and Hearings Section, and mail a copy of the file by certified mail, return receipt requested, to the other party. The file will contain only documentary evidence supporting or tending to support each party's allegations. The Office of Long Term Care will also submit an Administrative Hearing Statement summarizing the determination/ decision. This statement is not evidence. Only such portions of each file as are determined by the hearing officer to be relevant shall be included in the Administrative Hearing Record.
2. Both parties will be advised by the Appeals and Hearings Section via certified mail, return receipt requested, that they have ten (10) calendar days from the date the certified mail receipt was signed to review the hearing file and submit a request to subpoena witnesses. The request shall include the name, address and telephone number of all witnesses not employed by the Department of Health and Human Services (DHHS). DHS employees will be expected to attend hearings and present testimony without the benefit of a subpoena and will be notified by the Appeals and Hearings Section of their required presence at the hearing. Each party will be notified of any witnesses requested and will have five (5) working days from the receipt of this notice to request subpoenas for rebuttal witnesses.

The Department of Health and Human Services, Office of Chief Counsel, will issue the subpoenas, pursuant to the terms and authority of Ark. Code Ann. § 20-76-103.

3. After the time frame has expired for subpoenaing witnesses, the hearing officer will schedule the hearing to afford the petitioner, the Office of Long Term Care, and their attorneys, if any, at least ten (10) calendar days notice of the date, place and time of the hearing. The scheduling letter, sent via certified mail with return receipt requested, shall also contain the name of the hearing officer who will conduct the hearing. In the event the petitioner, the Office of Long Term Care representative, or an attorney representing the petitioner suffers from illness or cannot attend the hearing due to scheduling conflicts, that party may request the hearing be continued. The hearing will be rescheduled by the

hearing officer upon a showing of good cause. A request for continuance made by the petitioner or the petitioner's attorney will constitute a waiver of any objection as to timeliness of the hearing. In each case, the hearing and hearing record must be completed within one hundred twenty (120) calendar days of receipt of the request for a hearing.

4. The hearing will take place at a place and time convenient for the petitioner.

5. If the petitioner fails to appear for the hearing and does not contact the Appeals and Hearings Section prior to the date of the hearing of his/her inability to attend, the appeal will be deemed abandoned. The petitioner will be advised of this fact in the scheduling letter.

6. It is the responsibility of the Office of Long Term Care to designate a representative prior to the time of the hearing. The representative should be familiar with the circumstances of the determination/decision and be able to summarize the pertinent aspects of the situation and present the documentation to support the basis for the determination/decision. The representative should also be able to answer questions posed by the petitioner or the hearing officer relative to the issues and should be prepared to cross examine adverse witnesses. The representative may request the services of an Office of Chief Counsel attorney for representation at the hearing.

7. If any party is to be represented by an attorney, notice shall be given to all parties and to the Appeals and Hearings Section at least ten (10) calendar days prior to the hearing. Failure to furnish notice shall entitle other parties to a continuance to obtain counsel. Petitioner's failure to furnish notice shall constitute a waiver of objection as to timeliness of the hearing.

8. The hearing will be conducted by a hearing officer from the Appeals and Hearings Section who had no part in the determination/decision upon which the hearing is being conducted.

9. The petitioner may be accompanied by friends or other persons and may be represented by a friend, legal counsel, or other designated representative.

10. The hearing officer may not review the case record or other material either prior to or during the hearing unless such material is made available to the petitioner or his/her representative.

11. The hearing will be conducted in an informal but orderly manner. The hearing officer will explain the hearing procedure to the petitioner. The administrative hearing statement will be read by the Office of Long Term Care representative who will present his/her case which includes introducing evidence and questioning and witnesses. After completion of the Office's case, the petitioner's case will be presented. This includes the opportunity to present witnesses, advance arguments, offer additional evidence, question the representative, and to confront and cross examine adverse witnesses. If the petitioner is

unable to present his evidence in a logical manner, the hearing officer will assist him/her. Questioning of all parties will be confined to the issue(s) involved.

12. The hearing officer will prepare a comprehensive report of the proceedings. The report will consist of an introduction, recommended findings of fact, conclusions of law and decision. The report shall be submitted to the Director of the Division of Medical Services who, after reviewing the record, may accept, reverse or remand the report. If the Director accepts the report, such acceptance shall be reduced to writing and shall constitute the final agency determination. That determination shall be mailed to the petitioner and the Office of Long Term Care. If the Director remands the report, the hearing officer shall proceed in accordance with the instructions contained in the remand determination. The concluding determination made by the Director shall constitute the final agency determination. The determination shall be mailed to the petitioner and the Office of Long Term Care.

805 Any further review must be pursued in accordance with the Administrative Procedure Act, Arkansas Code Annotated § 25-15-101 et seq.