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Agency # 016.06

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

Arkansas Department of Human Services

Division of Medical Services

Office of Long Term Care

October 1, 1997  
(Revised ~~September 1, 2009~~ July 27, 2011)

Post Office Box 8059

Little Rock, Arkansas 72203-8059

(501) 682-8487

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### Rules and Regulations for Conducting Criminal Record Checks

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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 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, Act 63 of the first Extraordinary Session of 2003 and Act 1923 of 2005).

**NOTE: Effective September 1, 2009, pursuant to Act 762 of 2009, Arkansas Code Title 20 was amended to add a new Chapter to read as Chapter 38 to consolidate various processes for conducting criminal record checks within the Arkansas Department of Human Services for diverse service providers. Thereafter, the authority expressed within these regulations are conferred by Arkansas Code Ann. §20-38-101 et seq. in addition to other authority conferred on the Office of Long Term Care by Arkansas law or federal regulation.**

**TRANSITION: An operator who obtained licensure as a service provider or a person who was offered employment or employed by a service provider prior to September 1, 2009, who was subject to a criminal record check under §20-33-201 et seq, and has continued to be an operator or employed by the service provider who initiated the criminal record check may continue to be an operator of, or continue employment with the service provider based on the results of the criminal record check process conducted under §20-33-201 et seq. When the person next undergoes a periodic criminal record check, the person's continued operator status or employment with the service provider is contingent on the results of a criminal record check under §20-38-101 et seq.**

If any provisions of these rules and regulations, or the application thereof to any person or circumstances are 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 service providers 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 ACA §20-38-101 et seq (formerly 20-33-201 et seq).

"The Arkansas Department of Human Services is in compliance with Titles VI and VII of the Civil Rights Act and operates, manages 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 service provider is compensated either directly or indirectly.

Determination - The determination made by the licensing agency that a service provider, operator, applicant for employment with, or employee of a service provider is or is not disqualified from licensure, exemption from licensure, any other operating authority, or employment based on the criminal history of the service provider, operator, applicant or employee.

Elderly - Persons aged 65 years or older.

Employee -

1. A person who:

(i) Has unsupervised access to residents (clients) of a service provider except as provided in subsection 2 below;

(ii) (a) Provides care to residents (clients) of a service provider on behalf of, under supervision of, or by arrangement with the service provider; or

(b) Is employed by a service provider to provide care to residents (clients) of the service provider; or

(c) Is a temporary employee placed by an employment agency with a service provider to provide care to residents (clients) of the service provider; or

(d) Resides in an alternative living home in which services are provided to individuals with developmental disabilities.

2. Employee does not include a person who:

(i) Is a family member of a resident (client) receiving care from a service provider;

(ii) Is a volunteer; or

(iii) Works in an administrative capacity and does not have direct access to residents (clients) of a service provider.

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Employment Clearance Registry (ECR) – A 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.

Licensing Agency - Means the state agency (Department of Human Services/Division of Medical Services/Office of Long Term Care) charged with licensing, exemption from licensure, or granting other operating authority to a service provider

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 as a service provider.

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

Service Provider - A long term care facility as defined by A.C.A. § 20-10-101 or 20-10-702; "...a nursing home, residential care facility, assisted living facility, post-acute head injury retraining and residential care facility, or any other facility which provides long term medical or personal care". Note: Additional service providers covered by Ark. Code Ann. § 20-38-101 (formerly 20-33-201) et seq. include home health agencies and hospice providers. These service providers shall perform their criminal record checks through their licensing agency, the Arkansas Department of Health/Division of Health Facility Services. Also covered are individuals or entities that provide services designated as Elderchoices providers. These service providers shall perform their criminal record checks through the Department of Human Services/Division of Aging and Adult Services. Note: Prior to September 1, 2009, the term "qualified entity" was the same term and definition as "service provider".

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

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#### **200 IMPLEMENTATION**

**201** Before making an offer of employment, the service provider shall inform an applicant that employment is contingent on the satisfactory results of criminal history record checks. 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, regardless whether the record of the offense is expunged, pardoned, or otherwise sealed, 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, § 5-10-101;
2. Murder in the first ~~and~~ or second degree, §§ 5-10-102 and 5-10-103;
3. Manslaughter, § 5-10-104;
4. Negligent homicide, § 5-10-105;
5. Kidnapping, § 5-11-102;
6. False imprisonment in the first degree or second degree, §§ 5-11-103 and 5-11-104;
7. Permanent detention or restraint, § 5-11-106;
8. Robbery, § 5-12-102;
9. Aggravated robbery, § 5-12-103;
10. Battery in the first, second ~~and~~ or third degree, §§ 5-13-201, 5-13-202, and 5-13-203;
11. Aggravated assault, §5-13-204, ~~and~~ or assault in first, ~~and~~ second, or third degree, §§ 5-13-205, ~~and~~ 5-13-206, and 5-13-207;
12. Introduction of controlled substance into body of another person, § 5-13-210;
13. Terroristic threatening in the first ~~and~~ or second degree, § 5-13-301;
14. Rape, § 5-14-103;
15. Sexual assault in the first, second, third ~~and~~ or fourth degree, §§ 5-14-124 – 5-14-127;
16. Sexual indecency with a child, § 5-14-110;
17. Violation of a minor in the first ~~and~~ or second degree, §§ 5-14-120 and 5-14-121;
18. Incest, § 5-26-202;
19. Domestic Battery (all degrees), §§ 5-26-303 - 5-26-306;
20. Endangering the welfare of incompetent person in the first ~~and~~ or second degree, §§ 5-27-201 and 5-27-202;
21. Endangering the welfare of a minor in the first ~~and~~ or second degree, § 5-27-205 and 5-27-206;
22. Permitting abuse of a minor, § 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 employing or consenting to the use of a child in a sexual performance by producing, directing, or promoting a sexual performance by a child, §§ 5-27-303, 5-27-304, 5-27-305, 5-27-402, and 5-27-403;
24. Felony abuse of an endangered or impaired person, § 5-28-103;
25. Theft of property, § 5-36-103;
26. Theft by receiving, § 5-36-106;
27. Arson, § 5-38-301;

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28. Burglary, § 5-39-201;
29. Felony violation of the Uniform Controlled Substances Act, §§ 5-64-101 – 5-64-501 et seq;
30. Prostitution, §5-70-102, Patronizing a prostitute, §5-70-103, or Promotion of prostitution (all degrees), §§ 5-70-104 – 5-70-106;
31. Stalking, § 5-71-229;
32. Criminal attempt, criminal complicity, criminal solicitation, or criminal conspiracy, § 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, § 5-37-201;
34. Breaking or entering, § 5-39-202;
35. Obtaining a controlled substance by fraud, § 5-64-403;
36. Computer child pornography or failure to report computer child pornography, §§ 5-27-603 and 5-27-604;
37. Computer exploitation of a child in the first and second degree or distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child, §§ 5-27-605 and 5-27-602;
38. Coercion, §5-13-208;
39. Terroristic act, §5-13-310;
40. Voyeurism, §5-16-102;
41. Communicating death threat concerning a school employee or student, §5-17-101;
42. Interference with visitation or interference with court-ordered custody, §§5-26-501 and 5-26-502;
43. Contributing to the delinquency of a minor or juvenile, §§5-27-209 and 5-27-220;
44. Soliciting money or property from incompetents, §5-27-229;
45. Theft of services, §5-36-104;
46. Criminal impersonation, §5-37-208;
47. Financial identity fraud, §5-37-227;
48. Resisting arrest, §5-54-103;
49. Felony interference with a law enforcement officer, §5-54-104;
50. Cruelty to animals, or aggravated cruelty to a dog, cat, or horse, ~~§5-62-104~~ §§5-62-103 and 5-62-104;
51. Public display of obscenity, §5-68-205;
52. Promoting obscene materials, §5-68-303 or Promoting obscene performance, §5-68-304;
53. Obscene performance at a live public show, §5-68-305;
54. Public sexual indecency, §5-14-111;
55. Indecent exposure, §5-14-112;
56. Bestiality, §5-14-122;
57. Exposing another person to human immunodeficiency virus (HIV), §5-14-123;
58. Registered sex offenders, §§5-14-128 – 5-14-132;
59. Criminal use of a prohibited weapon, §5-73-104;
60. Simultaneous possession of drugs and firearms, §5-74-106; and
61. Unlawful discharge of a firearm from a vehicle, §5-74-107.

**201.1** Except as provided in Section 201.2 below, a conviction for an offense listed in

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Section 201 shall not disqualify an employee or applicant for employment if:

1. The conviction, or plea of nolo contendere or guilty, was a misdemeanor offense and the date of conviction, or plea of nolo contendere or guilty, of the offense is at least five (5) years from the date of the application for the criminal record check, and the person has no criminal convictions or pleas of guilty or nolo contendere of any type or nature during the five (5) year period preceding the record check; ~~and the person has completed the person's term of confinement, probation or parole related to the conviction of plea of guilty or nolo contendere;~~ or

2. The conviction, or plea of nolo contendere or guilty, was a felony offense and the date of the conviction, or plea of nolo contendere or guilty, of the offense is at least ten (10) years from the date of the application for the criminal record check, and the person has no criminal convictions or pleas of guilty or nolo contendere of any type or nature during the ten (10) year period preceding the record check ~~and the person has completed the person's term of confinement, probation or parole related to the conviction or plea of guilty or nolo contendere.~~

**NOTE:** ~~This provision~~ The provisions in 201.1(1) and 201.1(2) shall be applied at the initial criminal record check performed by a service provider. A person who has previously been disqualified by the Office of Long Term Care, and for whom the time for disqualification has passed (five years for misdemeanors or ten years for felonies) may have the disqualification removed by having a new criminal record check conducted ~~through the Arkansas State Police or FBI. The person shall also provide documentation that they are not confined, on probation or on parole related to the conviction or plea of guilty or nolo contendere of the disqualifying offense.~~

3. Even if a person would otherwise be disqualified under Section 201, a person shall not be disqualified if the person:

- a. Was not disqualified on August 31, 2009; and,
- b. Has not been found guilty of or pleaded guilty or nolo contendere to any offense listed in Section 201, a similar offense in another state, or a similar federal offense.

**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 offenses by any court in the State of Arkansas or any similar offense by a court of another state or federal court, whether or not the record of the offense is expunged, pardoned, or otherwise sealed, shall result in permanent disqualification of employment:

1. Capital murder, § 5-10-101;
2. Murder in the first ~~and~~ or second degree, §§ 5-10-102 and 5-10-103;
3. Kidnapping, § 5-11-102;
4. Rape, § 5-14-103;
5. Sexual assault in the first ~~and~~ or second degree, §§ 5-14-124 and 5-14-125;
6. Endangering the welfare of an incompetent person in the first degree, § 5-27-201;



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7. Felony abuse of an endangered or impaired person, § 5-28-103; and
8. Arson, § 5-38-301.

#### **202** Criminal record checks shall be conducted periodically as follows:

1. The requirement for a criminal record check for an operator shall apply to the first application signed by an operator and shall be required to undergo periodic criminal record checks no less than one (1) time every five (5) years. 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 has not had an initial criminal record check or a periodic criminal record check conducted within the previous five (5) years as required by these regulations.
2. Periodic criminal record checks shall be performed on all applicable employees on an ongoing basis. 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** 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, or an on-call employee of the facility ~~or~~ and 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 in staffing 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:

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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. Note: Pursuant to federal regulations, prior to placement to work with or access to residents, a long term care facility shall be responsible for conducting the "Registry" clearance on Certified Nursing Assistants (CNAs) as described in Section 302 of these regulations and maintain verifying documentation of such clearance at 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 periodic record check provisions in Section 202(2) 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 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

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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 in accordance with ACA §12-12-1013. 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. Any challenges to the accuracy of the report should be directed to the Arkansas State Police/Identification Bureau (501) 618-8500, #1 State Police Plaza Drive, Little Rock, Arkansas 72209.

**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 Human Services/Office of Long Term Care is authorized and directed to furnish "determinations" to long term care facilities/service providers.

Note: 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.

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### **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 online 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 online 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 ~~online employment clearance registry (ECR)~~ ECR system 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 the system.

~~Both systems~~ The online ECR system 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 online ECR system 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~~ The facility shall search by either the applicant's SSN and date of birth or by CNA certification number and date of birth.

**~~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.~~**

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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 and expiration date prior to employment restriction status.~~

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

~~e a.~~ For non-nursing assistants, "Inquiry Status - Not Found".

~~d b.~~ 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 ECR 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~~ The statements 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 ECR 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

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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~~ are not available.

**303** If, after checking the online ECR system (~~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 (or, if conducted online, maintain the completed form at the requesting facility) 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 request for a criminal record check, the Bureau shall issue within 24 hours an electronic report to the service provider and the Office of Long Term Care for a state report and to respond to request for national records checks within 10 calendar days after receipt of a report ~~from the FBI~~.

**305** After employment clearance is obtained from the online ECR system 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. 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 and the requesting facility. The Office of Long Term Care shall determine whether the applicant or employee is disqualified from employment and issue its Letter of Determination to the facility or requesting entity. If the criminal record report issued by the Bureau lists any conviction, of any type or nature, the facility shall be required to remove from unsupervised direct care duties any person who was offered temporary or continued employment until the Office of Long Term Care's Letter of Determination has been received. If the applicant or employee is disqualified from employment the facility shall terminate the employment of the employee or deny employment to the applicant.

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### **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~~ national record check 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 apply to the first application signed by an operator and the operator shall undergo periodic criminal record checks no less than one (1) time every five (5) years. 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 has not had an initial or a periodic criminal record check conducted within the previous five (5) years.

**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.

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### **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 these regulations. 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 Office of Long Term Care.

**501.1** Under some circumstances, an employment determination performed by other offices or divisions of the Arkansas Department of Human Services and the criminal history records check used to make the determination for an applicant or employee of a service provider are valid and transferrable for purposes of meeting the requirements of these regulations for application or employment in an Intermediate Care Facility for the Mentally Retarded (ICF/MR) and the ICF/MR is not required to conduct any further criminal records check except for periodic checks as described in Section 202. A valid and transferrable employment determination must meet the following conditions:

1. The determination must be made by:

a. The Division of Child Care and Early Childhood Education (DCCECE) for an applicant or employee of a child care facility or church-exempt child care facility; or,

b. The Division of Developmental Disabilities Services for an Alternative Community Services Waiver Program provider, an early intervention provider, or a nonprofit community program; and,

2. The ICF/MR employee or applicant will be continuously employed by the service provider in one (1) or more of the service provider types listed in 1(a) or (b), above; and,

3. The service provider types listed in 1(a) or (b), above, in which the employee or applicant will be employed are operated and administered by the same service provider; and,

4. The ICF/MR or the parent service provider maintains evidence acceptable to the Office of Long Term Care that the service provider types listed in 1(a) or (b), above, are operated and administered by the same service provider; and,



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5. The ICF/MR and all service provider types listed in 1(a) or (b) above, in which the employee or applicant is employed maintains an original or copy of the determination letter by the Divisions listed in 1(a) or (b), above.

**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.

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#### **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~~ are not available. However, previously granted waivers shall remain in ~~effect~~ effect 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~~ to such provisions as outlined in the "Fines and Sanctions" licensure regulations as listed above.

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

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### **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 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 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.

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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 Human Services (DHS). 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 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

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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, findings of fact, conclusions of law and decision. The report 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.