

# ARKANSAS REGISTER

## Transmittal Sheet

Use only for **FINAL** and **EMERGENCY RULES**



Secretary of State

**Mark Martin**

500 Woodlane, Suite 026

Little Rock, Arkansas 72201-1094

(501) 682-5070

[www.sos.arkansas.gov](http://www.sos.arkansas.gov)



For Office

Use Only:

Effective Date \_\_\_\_\_ Code Number \_\_\_\_\_

Name of Agency Department of Human Services

Department Division of Medical Services/Office of Medicaid Inspector General

Contact Mac Golden E-mail Mac.Golden@dhs.arkansas.gov Phone 501-320-6383

Statutory Authority for Promulgating Rules Arkansas Code Annotated 20-76-201

**Rule Title:** DHS Policy 1088, Participant Exclusion Rule

**Intended Effective Date**

(Check One)

☐ Emergency (ACA 25-15-204)

☐ 10 Days After Filing (ACA 25-15-204)

☒ Other 02-01-2020  
(Must be more than 10 days after filing date.)

Legal Notice Published .....

Final Date for Public Comment .....

Reviewed by Legislative Council .....

Adopted by State Agency .....

**Date**

10-31-2019

11-29-2019

01-17-2020

02-01-2020

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Renita Whitley Renita.Whitley@dhs.arkansas.gov

01-17-2020

Contact Person

E-mail Address

Date

### CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted  
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)

Janet Mann  
Signature

501-320-6270

Janet.Mann@dhs.arkansas.gov

Phone Number

E-mail Address

Director

Title

01-17-2020

Date

## **1088.0 DHS PARTICIPANT EXCLUSION RULE**

### **1088.1 Purpose—Intent**

(a)(1) The Arkansas Department of Human Services (DHS) shall conduct business only with responsible participants.

(2) Participants will be excluded from participation in DHS programs to protect public funds, the integrity of publicly funded programs, and public confidence in those programs.

(3) It is also the intent of this policy to prevent excluded participants from substituting others in their place, usually accomplished through related parties, as surrogates to continue the practices that caused DHS or the Office of Medicaid Inspector General (OMIG) to exclude the participant.

(b)(1) Participant exclusion is a serious action that shall be used only in the State's best interests and for the protection of the public, public programs, and DHS.

(2) DHS and OMIG shall impose exclusion only in accordance with this rule.

### **1088.2 Application**

(a) This rule applies to all participants, including related parties, as defined in § 1088.3. The rights, obligations, and remedies created and imposed by this rule are in addition to any rights, obligations, and remedies under any other applicable law, regulation, policy, or rule.

(b) Notwithstanding the other provisions of this rule, DHS or OMIG may not exclude a participant based on a criminal offense identified on a criminal background check if:

(1) The participant is employed as, or is being considered for employment as, a peer support specialist or other similar position requiring that the individual has personally received services within the behavioral health system;

(2) The participant:

(A) Works or is applying to work with individuals receiving substance abuse treatment; or

(B) Obtains certification in peer recovery by the Arkansas Substance Abuse Certification Board and:

(i) The certification is obtained after the commission of the criminal offense; and

(ii) The certification process includes due process for appealing a decision based upon a disqualifying charge in the criminal background check; and

(3) The criminal offense does not involve violence or a sexual act.

### **1088.3 Definitions**

As used in this rule:

(1)(A) "Administrative adjudication" means an appeal hearing conforming to the Arkansas Administrative Procedure Act, codified as Ark. Code Ann. §25-15-201 et seq.

(B) Administrative appeals must be limited to the extent necessary to avoid compromising any ongoing criminal investigation;

(2) "Appropriation" means the authority granted by the Arkansas General Assembly to expend public funds for specified purposes;



(3) "Civil judgment" means the disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for a wrongful act;

(4) "Collateral exclusion" means exclusion from one program based upon a previous final exclusion from another program as provided in 1088.4(a)(2) and (3);

(5) "Common ownership" means when an entity, entities, an individual or individuals possess 5% or more ownership or equity in the participant;

(6) "Control" means an individual or an organization has the power, directly or indirectly, to influence or direct the actions or policies of a participant, including control due to ownership interest, management, or administration;

(7) "DHS" means the Arkansas Department of Human Services, including all divisions, offices, and units thereof;

(8) "Exclusion" means the process in which a participant or, when applicable, a related party, is prohibited from participating in any DHS program, including all contracts, grants, licenses, certifications, and agreements involving the expenditure of appropriated funds unless such funds are for proper charges approved before the date of exclusion and the participant has reimbursed any funds owed to DHS;

(9)(A) "Expungement" means the sealing of criminal records for the purpose of keeping the records confidential.

(B) "Expungement" includes a criminal conviction, or a pre-adjudication plea of guilty or nolo contendere, that is sealed pursuant to the Comprehensive Record Sealing Act of 2013, Ark. Code Ann. § 16-90-140 et seq., or a similar Arkansas state statute sealing criminal records, or a similar statute of another state, or a federal statute or federal court order;

(10) "Final determination" means, unless provided otherwise in federal law or regulation, all appeals have been exhausted or the deadline to appeal the determination upon which the exclusion is based has passed;

(11) "Immediate family member" means a person's:

(A) Spouse;

(B) Natural or adoptive parent, child, or sibling;

(C) Stepparent, stepchild, or stepsibling;

(D) Father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law; or

(E) Grandparent or grandchild;

(12) "Mandatory exclusion" means exclusion imposed following and based upon a final adjudication of one or more acts or omissions described in 1088.4;

(13) "Nonconforming commodities or services" means goods or services not in accordance with the obligations under the contract, agreement, standards, or manual;

(14) "Participant" means a person or entity that:

(A) Is a party to or is seeking to become a party to a contract, grant or any type of agreement with DHS to furnish commodities or services to, on behalf of, or as a grantee or sub-grantee, DHS or any recipient of DHS services;

(B) Is issued or is seeking a license, certification, or authorization by DHS;

(C) Is receiving or seeking to receive appropriated funds from DHS;

(D) Was substantially involved in the act or omission giving rise to the exclusion; or

(E) Is an employee or independent contractor engaged to deliver healthcare goods or services for an individual or entity that is an enrolled Medicaid provider;

(15)(A) "Related party" means a person or an entity:

(i) Associated or affiliated with the participant;

(ii) That shares common ownership, control, or common board members with the participant;

(iii) That has control of the participant;

(iv) Is controlled by the participant; or

(v) That has significant influence over the participant.

(B) "Related party" may include but is not limited to:

(i) Principal owners of the entity and members of their immediate families;

(ii) Management of the entity and members of their immediate families;

(iii) Other parties that can significantly influence the management or operating policies of the transacting parties or that have an ownership interest in one of the transacting parties and can significantly influence the other to an extent that one or more of the transacting parties might be prevented from fully pursuing its own separate interests; or

(iv) Any person or entity who was substantially involved in the act or omission giving rise to the exclusion.

(C) "Related party" does not include a managed care organization (MCO), Provider led Arkansas Shared Savings Entity (PASSE), or similar type of entity with its own network of direct service providers merely due to the business agreement with the network providers;

(16) "Secretary" means the DHS Secretary or his or her designee; and

(17) "Temporary exclusion" means exclusion from participation or payment pending the outcome of an investigation, adjudication (if the participant timely requests adjudication), or trial.

#### **1088.4 Mandatory Exclusion**

(a) DHS, or OMIG with respect to Arkansas Medicaid programs, shall automatically exclude a participant:

(1) If the participant is the subject of a final determination that the participant has wrongfully acted or failed to act with respect to, or has been found guilty, or pled guilty or nolo contendere, to any crime related to:

(A) Obtaining, attempting to obtain, or performing a public or private contract or subcontract;

(B) Embezzlement, theft, forgery, bribery, falsification or destruction of records, any form of fraud, receipt of stolen property, or any other offense indicating moral turpitude or a lack of business integrity or honesty;

(C) Controlled substances or other drug-related offenses when the offense is a felony;

(D) Federal antitrust statutes;

(E) The submission of bids or proposals;

(F) Any physical abuse, sexual abuse, or neglect when the offense is a felony;

(G) The neglect or abuse of a patient in connection with the delivery of a healthcare item or service; or

(H) Child pornography, when the offense is a felony;

(2)(A) That is presently subject to debarment, suspension, or other exclusion by any unit of the federal government or any unit of a state government, if the debarment, suspension, or exclusion was imposed after an opportunity for due process, and if federal law does not expressly prohibit collateral exclusion under the circumstances.

(B) Exclusion under subdivision (a)(2)(A) of this section shall be concurrent with the period of debarment, suspension, or exclusion imposed by the federal or state government;



(3)(A) Upon learning that the participant was terminated or excluded for cause from participation in a program by any unit of the federal government or any unit of a state government, provided that:

(i) The debarment or exclusion was imposed after an opportunity for due process; and

(ii) Federal law does not expressly prohibit collateral exclusion under the circumstances.

(B) The term of exclusion under subdivision (a)(3)(A) of this section shall be determined under 1088.8; or

(4) When that participant agrees to exclusion as part of a final settlement agreement to resolve potential or pending criminal charges or any civil matter involving a state healthcare plan.

(b) Participants automatically excluded are not permitted to re-litigate through the administrative process the facts or law determined by the final adjudication under subsection (a) of this section.

### **1088.5 Discretionary Exclusion**

DHS, or OMIG with respect to Arkansas Medicaid programs, may exclude participants for any of the following acts or omissions that are of a character regarded by the Secretary or OMIG to be so serious as to justify exclusion:

(1) Any true or substantiated final finding of abuse, neglect, or other maltreatment on the part of the provider under the:

(A) Child Maltreatment Act, Ark. Code Ann. § 12-18-101 et seq.; or

(B) Adult and Long-Term Care Facility Resident Maltreatment Act, Ark. Code Ann. § 12-12-1701 et seq.;

(2) Refusal or knowing failure, without good cause, to comply with applicable requirements (including requirements contained or incorporated in statutes, rules, contracts, or purchase orders) or within the time provided in the contract or grant;

(3) Failure to perform or unsatisfactory performance, provided that the failure to perform or unsatisfactory performance beyond the control of the contractor or grantee shall not be considered to be a basis for exclusion;

(4) Failure to post any surety bond, or to provide similar guarantees acceptable to DHS required under any contract or grant;

(5) Substitution of commodities or services without prior written approval of DHS;

(6) Failure to cure nonconforming commodities or services within the lesser of a reasonable time, or the time specified in the contract or in a corrective action plan;

(7) Refusal to accept a contract or grant awarded in accordance with the request for proposal or invitation for bid;

(8) Making material misrepresentations or failing to make representations or disclosures when required or when a reasonable person would naturally have been expected to affirm or deny the existence of a material fact;

(9) Collusion or collaboration with any bidder, proposer, or applicant in the submission of any proposal, bid, or grant application for the purpose of lessening or reducing competition;

(10) Failure to submit to or to supply an audit as required by federal or state law or rule;

(11) Failure or refusal, after request by DHS or OMIG, to supply records related to the contract, proposal, bid, or application;

(12) Any act or omission that causes or materially contributes to placement of a lien upon the assets of the State;

(13) Conviction related to the use of illegal drugs, controlled substances, or other drug-

related offenses when the offense is a misdemeanor;

(14) Any physical abuse, sexual abuse, or neglect when the offense is a misdemeanor;

(15) Submitting, without good cause, a bill or claim for payment exceeding the amount to which the participant is entitled;

(16) Failure to make repayment arrangements acceptable to the Department to repay any funds owed the Department, or failure to strictly adhere to the terms of any agreed-to repayment arrangements;

(17) Failure to comply with professional standards of care or conduct applicable to the service provided;

(18) Failure to comply with standards or requirements relating to any license, permit, certification, other publicly granted authority, or accreditation needed to provide any service funded in whole or in part with public funds;

(19) Failure to fully and accurately make any disclosures required by contract, federal or state law or rule;

(20) Transaction of business in knowing contravention of an exclusion imposed under this rule; or

(21) Child pornography, when the offense is a misdemeanor.

#### **1088.6 Persons and Entities Excluded**

In addition to excluded participants, exclusion applies to:

(1)(A) All the participant's related parties, and the heirs and assigns of the participants and related parties.

(B) Whether a related party should be excluded or prevented from being a substitute in place of an excluded person or entity will be based on the specific facts of the exclusion and the relationship between the related parties as determined by DHS or OMIG; and

(2)(A) The participant's immediate family members, in order to prevent continued wrongdoing via a surrogate.

(B) Generally, immediate family members will be excluded from participation in any entity to which the excluded participant was a related party, any successor entity, or a start-up entity in the same or a similar program.

#### **1088.7 Effect of Exclusion**

(a)(1) Those excluded may not receive appropriated funds except to the extent such funds are for proper charges approved before the date of exclusion.

(2) Payments are limited to the amount by which the proper charges exceed the amount of any indebtedness to DHS.

(b)(1) DHS shall maintain a list of those excluded.

(2) Upon being listed as excluded, the person or entity:

(A) Cannot continue as a party to any DHS contract, grant, license, certification, or agreement with DHS involving the expenditure of appropriated funds and the issuance of licenses, certifications, or any type of authorization by DHS;

(B) Is ineligible to submit, directly or indirectly, proposals, bids, or applications to DHS for the term of the exclusion; and

(C) Cannot act as a participant in the delivery of healthcare goods or services in any DHS program for the term of the exclusion.



#### **1088.8 Term of Exclusion:**

(a)(1) The term of the exclusion shall be set after consideration of the nature and seriousness of the wrongful act or omission warranting exclusion, the length of time since any wrongful act or omission warranting exclusion, and the goals and purposes underlying this rule.

(2) The term of exclusion must be stated in the exclusion determination.

(b)(1) Exclusion shall be for not less than one year and at least until all appropriated funds, costs, and penalties owed to DHS by the participant are paid in full and the participant meets all contract or grant requirements as well as all applicable requirements in federal rules and laws.

(2) Exclusion of immediate family members and related parties shall run concurrently not to exceed five years.

#### **1088.9 Procedural Rules**

(a)(1) DHS or OMIG must prove the act or omission upon which the exclusion is based by a preponderance of the evidence.

(2) An excluded person or entity must prove the elements of any defense by a preponderance of the evidence.

(b) Administrative due process shall be accomplished via existing DHS processes for appeals by an excluded person or entity.

(c) An excluded person or entity is entitled to an administrative hearing, the hearing must be held within a reasonable time after temporary exclusion, and before any exclusion other than a temporary exclusion.

(d) Expunged records of a plea or finding of guilt shall be considered by DHS for purposes of this rule unless otherwise excluded by law or regulation.