

**ARKANSAS DEPARTMENT OF HUMAN SERVICES AND OFFICE OF MEDICAID  
INSPECTOR GENERAL, DIVISION OF MEDICAL SERVICES**

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**SUBJECT:** Department of Human Services Policy 1088 – Participant Exclusion Rule

**DESCRIPTION:** DHS Policy 1088, Participant Exclusion Rule, is being revised to:

- Clarify that the Office of Medicaid Inspector General (OMIG) is an entity that may exclude Medicaid providers pursuant to Ark. Code Ann. § 20-77-2506;
- Clarify the procedure for adding an individual or organization to the excluded participant list and the duration of the exclusion;
- Clarify the circumstances that may result in mandatory and discretionary exclusions;
- Add language to implement Acts 2019, No. 951, which provides that an individual working as a peer support specialist may not be excluded from participation in the Arkansas Medicaid Program if the exclusion was based on a criminal background check under certain circumstances, including that the individual obtains certification in peer recovery and the criminal offense does not involve violence or a sexual act;
- Rearrange and renumber sections so that the rule is set out in a more logical order;
- Make general revisions to the language for clarity.

**PUBLIC COMMENT:** No public hearing was held on this rule. The public comment period expired November 29, 2019. The agency reported that it received no public comments.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following answers:

**QUESTION 1:** Is there specific statutory authority for the new or altered definitions of the following words? If there is not statutory authority, where did the definitions come from?

- Exclusion
- Expungement
- Participant
- Related party

**RESPONSE:** DHS agency discretion and authority requires it to only conduct business with responsible participants to protect public funds, the integrity of publicly funded programs, and public confidence in those programs, including updates to comply with Act 951 of 2019. Also, DHS clarified that OMIG is an entity that may exclude Medicaid providers under Ark. Code Ann. § 20-77-2506.

In updating and clarifying the rule, DHS in its agency discretion has chosen to define the terms above. 42 C.F.R. 1002.210 (referencing 42 C.F.R. 1001 and 1003) is applicable to

define administrative procedures to exclude individuals or entities for period of exclusion as determined by the State agency. Also, expungement has statutory authority in Ark. Code Ann. § 16-93-301 although that code section substituted the word “sealing” for expungement in 2013. DHS has chosen to retain use of the term expungement but has referenced the 2013 Act in the definition.

**QUESTION 2:** Is there statutory authority for the child pornography conviction exclusions in §§ 1088.4(a)(1)(H) and 1088.5(21), or are these just based on a policy decision? **RESPONSE:** Yes. Ark. Code Ann. § 12-12-927.

**QUESTION 3:** What is the authority for the new discretionary exclusion based on a true or substantiated finding that the provider violated the Arkansas Child Maltreatment Act or the Adult and Long-Term Care Facility Resident Maltreatment Act (in § 1088.5)? **RESPONSE:** 42 C.F.R. 1002.210 (referencing 42 C.F.R. 1001 and 1003), along with agency discretion as described above.

Per the agency, this rule does not require CMS approval.

The proposed effective date is February 1, 2020.

**FINANCIAL IMPACT:** The agency stated that this rule has no financial impact.

**LEGAL AUTHORIZATION:** The proposed rules implement Act 951 of 2019, sponsored by Representative Laurie Rushing, which prohibited the Department of Human Services from excluding individuals from participation in the Arkansas Medicaid Program based on a criminal background check under certain circumstances. The Department has specific authority to establish and maintain Arkansas Medicaid, as well as general authority to administer public assistance programs and promulgate rules as “necessary or desirable” to administer these programs. *See* Ark. Code Ann. §§ 20-76-201(1), (12), 20-77-107.

In addition, the Department may promulgate rules as necessary for Arkansas Medicaid to comply with federal law and receive federal funding. *See* Ark. Code Ann. §§ 20-10-129(b). Federal law requires states to implement administrative procedures for state-initiated Medicaid exclusions. *See* 42 C.F.R. § 1002.210. OMIG is responsible for pursuing exclusion of medical providers from the Arkansas Medicaid Program and for implementing rules within the Program to prevent fraud. *See* Ark. Code Ann. § 20-77-2506(6)(A)(iv), (21).



**QUESTIONNAIRE FOR FILING PROPOSED RULES WITH THE**  
**ARKANSAS LEGISLATIVE COUNCIL**

**DEPARTMENT/AGENCY** Department of Human Services and Office of Medicaid Inspector General  
**DIVISION** Division of Medical Services  
**DIVISION DIRECTOR** Janet Mann  
**CONTACT PERSON** Isaac Linam  
**ADDRESS** PO Box 1437, Slot S295, Little Rock, AR 72203-1437  
**PHONE NO.** 501-320-6570      **FAX NO.** 501-404-4619      **E-MAIL** Isaac.Linam@dhs.arkansas.gov  
**NAME OF PRESENTER AT COMMITTEE MEETING** Janet Mann and Elizabeth Smith  
**PRESENTER E-MAIL** Janet.Mann@dhs.arkansas.gov; Elizabeth.Smith@omig.arkansas.gov

**INSTRUCTIONS**

- A. Please make copies of this form for future use.**
- B. Please answer each question completely using layman terms. You may use additional sheets, if necessary.**
- C. If you have a method of indexing your rules, please give the proposed citation after “Short Title of this Rule” below.**
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:**

**Jessica C. Sutton**  
**Administrative Rules Review Section**  
**Arkansas Legislative Council**  
**Bureau of Legislative Research**  
**One Capitol Mall, 5<sup>th</sup> Floor**  
**Little Rock, AR 72201**

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- Department of Human Services Policy 1088 – Participant Exclusion Rule
1. What is the short title of this rule? \_\_\_\_\_
  2. What is the subject of the proposed rule? Updates and clarifies the DHS Policy 1088 Participant Exclusion Rule
  3. Is this rule required to comply with a federal statute, rule, or regulation? Yes  No   
If yes, please provide the federal rule, regulation, and/or statute citation. 42 CFR § 1002.210
  4. Was this rule filed under the emergency provisions of the Administrative Procedure Act?  
Yes \_\_\_\_\_ No   
If yes, what is the effective date of the emergency rule? \_\_\_\_\_  
When does the emergency rule expire? \_\_\_\_\_  
Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes \_\_\_\_\_ No \_\_\_\_\_

5. Is this a new rule? Yes \_\_\_\_\_ No  If yes, please provide a brief summary explaining the rule.

Does this repeal an existing rule? Yes \_\_\_\_\_ No  If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes  No \_\_\_\_\_ If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."**

Attached.

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation.

Arkansas Code §§ 20-76-201, 20-77-107, 20-77-2506, and 25-10-129

7. What is the purpose of this proposed rule? Why is it necessary?  
See attached.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b).

<https://humanservices.arkansas.gov/resources/legal-notices>

9. Will a public hearing be held on this proposed rule? Yes \_\_\_\_\_ No   
If yes, please complete the following:

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Place: \_\_\_\_\_

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

November 29, 2019

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

February 1, 2020

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. See attached.

13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e). See attached.

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

Unknown



**FINANCIAL IMPACT STATEMENT**

**PLEASE ANSWER ALL QUESTIONS COMPLETELY**

**DEPARTMENT** Department of Human Services and Office of Medicaid Inspector General  
**DIVISION** Division of Medical Services  
**PERSON COMPLETING THIS STATEMENT** Misty Bowen-Eubanks  
**TELEPHONE NO.** 501-320-6327      **FAX NO.** 501-682-6444      **EMAIL:** misty.boweneubanks@dhs.arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

**SHORT TITLE OF THIS RULE** Department of Human Services Policy 1088 – Participant Exclusion Rule

1. Does this proposed, amended, or repealed rule have a financial impact?  
Yes \_\_\_\_\_ No   x
  
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?  
Yes   x   No \_\_\_\_\_
  
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes   x   No \_\_\_\_\_

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost;
  
  - (b) The reason for adoption of the more costly rule;
  
  - (c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and
  
  - (d) Whether the reason is within the scope of the agency’s statutory authority, and if so, please explain.
- 
4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:
    - (a) What is the cost to implement the federal rule or regulation?

**Current Fiscal Year**

General Revenue	_____	\$0.00
Federal Funds	_____	\$0.00
Cash Funds	_____	\$0.00
Special Revenue	_____	\$0.00

**Next Fiscal Year**

General Revenue	_____	\$0.00
Federal Funds	_____	\$0.00
Cash Funds	_____	\$0.00
Special Revenue	_____	\$0.00

Other (Identify) \_\_\_\_\_ \$0.00  
 Total \_\_\_\_\_ \$0.00

Other (Identify) \_\_\_\_\_ \$0.00  
 Total \_\_\_\_\_ \$0.00

(b) What is the additional cost of the state rule?

**Current Fiscal Year**

**Next Fiscal Year**

General Revenue \_\_\_\_\_ \$0.00  
 Federal Funds \_\_\_\_\_ \$0.00  
 Cash Funds \_\_\_\_\_ \$0.00  
 Special Revenue \_\_\_\_\_ \$0.00  
 Other (Identify) \_\_\_\_\_ \$0.00  
 Total \_\_\_\_\_ \$0.00

General Revenue \_\_\_\_\_ \$0.00  
 Federal Funds \_\_\_\_\_ \$0.00  
 Cash Funds \_\_\_\_\_ \$0.00  
 Special Revenue \_\_\_\_\_ \$0.00  
 Other (Identify) \_\_\_\_\_ \$0.00  
 Total \_\_\_\_\_ \$0.00

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

**Current Fiscal Year**

**Next Fiscal Year**

\$ \_\_\_\_\_ \$0.00

\$ \_\_\_\_\_ \$0.00

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6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

**Current Fiscal Year**

**Next Fiscal Year**

\$ \_\_\_\_\_ \$0.00

\$ \_\_\_\_\_ \$0.00

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7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes \_\_\_\_\_ No  \_\_\_\_\_

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously

with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
  - (a) justifies the agency's need for the proposed rule; and
  - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
  - (a) the rule is achieving the statutory objectives;
  - (b) the benefits of the rule continue to justify its costs; and
  - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.



## NOTICE OF RULE MAKING

The Director of the Division of Medical Services of the Department of Human Services announces for a public comment period of thirty (30) calendar days a notice of rulemaking for the following proposed rule under one or more of the following chapters, subchapters, or sections of the Arkansas Code: §§ 20-76-201, 20-77-107, and 25-10-129.

### **Effective February 1, 2020:**

DHS Policy 1088, Participant Exclusion Rule, is being revised to:

- Clarify that the Office of Medicaid Inspector General (OMIG) is an entity that may exclude Medicaid providers pursuant to Ark. Code Ann. § 20-77-2506
- Clarify the procedure for adding an individual or organization to the excluded participant list and the duration of the exclusion
- Clarify the circumstances that may result in mandatory and discretionary exclusions
- Add language to implement Acts 2019, No. 951, which provides that an individual working as a peer support specialist may not be excluded from participation in the Arkansas Medicaid Program if the exclusion was based on a criminal background check under certain circumstances, including that the individual obtains certification in peer recovery and the criminal offense does not involve violence or a sexual act
- Rearrange and renumber sections so that the rule is set out in a more logical order
- Make general revisions to the language for clarity

The proposed rule is available for review at the Department of Human Services (DHS) Office of Rules Promulgation, 2nd floor Donaghey Plaza South Building, 7th and Main Streets, P. O. Box 1437, Slot S295, Little Rock, Arkansas 72203-1437. You may also access and download the proposed rule on the Medicaid website at <https://medicaid.mmis.arkansas.gov/General/Comment/Comment.aspx>. Public comments must be submitted in writing at the above address or at the following email address: [ORP@dhs.arkansas.gov](mailto:ORP@dhs.arkansas.gov). All public comments must be received by DHS no later than **November 29, 2019**. Please note that public comments submitted in response to this notice are considered public documents. A public comment, including the commenter's name and any personal information contained within the public comment, will be made publicly available and may be seen by various people.

If you need this material in a different format, such as large print, contact the Office of Rules Promulgation at 501-320-6164.

The Arkansas Department of Human Services is in compliance with Titles VI and VII of the Civil Rights Act and is operated, managed and delivers services without regard to religion, disability, political affiliation, veteran status, age, race, color or national origin. **4501888131**

  
\_\_\_\_\_  
Janet Mann, Director  
Division of Medical Services

1 State of Arkansas  
2 92nd General Assembly  
3 Regular Session, 2019  
4

As Engrossed: H3/13/19  
**A Bill**

HOUSE BILL 1433

5 By: Representative Rushing  
6

7 **For An Act To Be Entitled**

8 AN ACT TO AUTHORIZE INDIVIDUALS WITH PRIOR DRUG-  
9 RELATED OFFENSES TO WORK WITH INDIVIDUALS RECEIVING  
10 SUBSTANCE ABUSE TREATMENT AS PEER SUPPORT SPECIALISTS  
11 OR SIMILAR POSITIONS REQUIRING A HISTORY OF RECEIVING  
12 BEHAVIORAL HEALTH SERVICES; TO DECLARE AN EMERGENCY;  
13 AND FOR OTHER PURPOSES.  
14

15 **Subtitle**

16 TO AUTHORIZE INDIVIDUALS WITH PRIOR DRUG-  
17 RELATED OFFENSES TO WORK WITH INDIVIDUALS  
18 RECEIVING SUBSTANCE ABUSE TREATMENT AS  
19 PEER SUPPORT SPECIALISTS OR SIMILAR  
20 POSITIONS; AND TO DECLARE AN EMERGENCY.  
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24 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
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26 SECTION 1. Arkansas Code § 20-38-105, concerning disqualification from  
27 employment based on criminal background checks, is amended to add an  
28 additional subsection to read as follows:

29 (g) Notwithstanding any other provision of law, a person is not  
30 disqualified from employment if:

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

34 (2) The person works or is applying to work with individuals  
35 receiving substance abuse treatment; and

36 (3) The only offense on the person's criminal background check





1 that would disqualify him or her from employment is an offense that does not  
2 involve violence or a sexual act.

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4 SECTION 2. Arkansas Code Title 20, Chapter 77, Subchapter 1, is  
5 amended to add an additional section to read as follows:

6 20-77-135. Peer support specialist.

7 The Department of Human Services shall not disqualify or exclude an  
8 individual from participation in the Arkansas Medicaid Program based on a  
9 criminal background check if:

10 (1) The individual is employed as a peer support specialist or  
11 other similar position;

12 (2) The individual obtains certification in peer recovery by the  
13 Arkansas Substance Abuse Certification Board;

14 (3) The certification was obtained after the commission of a  
15 criminal offense;

16 (4) The criminal offense does not involve violence or a sexual  
17 act; and

18 (5) The certification process includes due process for appealing  
19 a decision based upon a disqualifying charge in the criminal background  
20 check.

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22 SECTION 3. EMERGENCY CLAUSE. It is found and determined by the  
23 General Assembly of the State of Arkansas that use of the new Peer Support  
24 benefit in the Arkansas Medicaid Program is hindered by the inability under  
25 current rules to hire individuals who have committed drug-related offenses;  
26 that individuals who have served jail time can often have the most success in  
27 reaching individuals struggling with substance abuse addiction; that  
28 substance abuse is a growing issue for the State of Arkansas; that barriers  
29 should be removed to give providers all necessary resources to combat  
30 substance abuse; and that this act is immediately necessary to allow the  
31 Department of Human Services to make administrative rules at the earliest  
32 possible date to ensure the employment of individuals with drug-related  
33 offenses in the Peer Support benefit, to help reach individuals struggling  
34 with substance abuse addiction, and to combat substance abuse addiction.  
35 Therefore, an emergency is declared to exist, and this act being immediately  
36 necessary for the preservation of the public peace, health, and safety shall



1 become effective on:

2 (1) The date of its approval by the Governor;

3 (2) If the bill is neither approved nor vetoed by the Governor,  
4 the expiration of the period of time during which the Governor may veto the  
5 bill; or

6 (3) If the bill is vetoed by the Governor and the veto is  
7 overridden, the date the last house overrides the veto.

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*/s/Rushing*

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**APPROVED: 4/12/19**

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