

Chapter 93, Employee Misconduct Registry (EMR)

§93.1. Purpose.

(a) This chapter implements Texas Health and Safety Code, Chapter 253, Employee Misconduct Registry, regarding investigating and entering into the employee misconduct registry (EMR) a to track findings of reportable conduct by an unlicensed employee of a facility, or agency, or an individual employer.

(b) The Department of Aging and Disability Services (DADS) maintains the ~~employee misconduct registry (EMR)~~ and enters information in the EMR in accordance with §93.8 of this chapter (relating to Entering Information in the EMR).

(c) The EMR lists persons who are not employable in a facility, ~~or agency, or by an individual employer.~~

Chapter 93, Employee Misconduct Registry (EMR)

§93.2. Definitions.

The following words and terms in this chapter have the following meanings, unless the context clearly indicates otherwise:

(1) Abuse--Is defined by the statute or rule that governs the investigation of alleged abuse of a person receiving facility or agency services, or an individual using the consumer directed services option.

(2) Administrative law judge--A SOAH attorney who conducts administrative hearings.

(3) Administrative hearing--A hearing held by SOAH to determine whether an employee of a facility or agency has committed reportable conduct.

(4) Agency--In this chapter means:

(A) a home and community support services agency licensed under Texas Health and Safety Code, Chapter 142, that provides services to an elderly or disabled adult;

(B) a person exempt from licensing under Texas Health and Safety Code, §142.003(a)(19);

(C) a facility for persons with an intellectual disability ~~mental retardation~~ or related conditions licensed under Texas Health and Safety Code, Chapter 252;

(D) a state supported living center;

(E) a local ~~mental retardation or mental health~~ authority to which Health and Human Services Commission's (HHSC) authority, as described in Texas Health and Safety Code §531.002(10) and (11), has been designated ~~under Texas Health and Safety Code, §533.035;~~

(F) a community ~~mental health and mental retardation~~ center as defined in Texas Health and Safety Code, §531.002;

(G) a mental health facility operated by the Department of State Health Services;

(H) the intermediate care facility for persons with an intellectual disability ~~mental retardation~~ component of the Rio Grande State Center; or

(I) a contractor of an entity described in subparagraphs (D)-(H) of this paragraph.

(J) Individual Employer – an individual or legally authorized representative who participates in the consumer-directed service option, described in Chapter 41 of this title (relating to Consumer Directed Services Option), and is responsible for hiring service providers to deliver program services.

(5) CDS Option – Consumer Directed Services option. A service delivery option, described in Chapter 41 of this title (relating to Consumer Directed Services Option), in which an individual or LAR employs and retains service providers and directs the delivery of program services.

(6)(5) Child--A person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.

(7)(6) Commissioner--The commissioner of DADS.

(8) Consumer – A resident or an individual receiving services from a facility covered in Texas Health and Safety Code, Chapter 253.

(9)(7) DADS--The Department of Aging and Disability Services.

(10)(8) Employee--A person who:

(A) works for an agency, ~~or~~ a facility, or an individual employer;

(B) provides personal care services, active treatment, or any other personal services to a person receiving facility or agency services, or to an individual using the CDS option; and

(C) is not licensed to perform those services or is a nurse aide.

(11)(9) EMR--Employee Misconduct Registry. The registry described in Texas Health and Safety Code, Chapter 253, and available on the DADS Internet website.

(12)(10) Exploitation--Is defined by the statute or rule that governs the investigation of alleged exploitation of a person receiving facility or agency services, or an individual employer using the CDS option.

(13)(11) Facility--In this chapter means:

(A) a nursing facility licensed under Texas Health and Safety Code, Chapter 242;

(B) an assisted living facility licensed under Texas Health and Safety Code, Chapter 247;

(C) a home and community support services agency licensed under Texas Health and Safety Code, Chapter 142, that provides services to a child;

(D) a home and community support services agency licensed under Texas Health and Safety Code, Chapter 142, as a hospice inpatient unit of hospice residential unit;

(E) an adult day care facility licensed under Texas Human Resources Code, Chapter 103;

(F) an adult foster care provider that contracts with DADS: Or

(G) a prescribed pediatric extended care center licensed under Texas Health and Safety Code, Chapter 248A.

(14) FMSA – A financial management services agency. An entity, as defined in §41.103 of this title, that contracts with DADS to provide financial management services to individuals who use the consumer directed services option.

(15)(12) IR--Informal review. An opportunity for an employee to dispute a finding of reportable conduct by providing testimony and supporting documentation to an impartial DADS staff person.

(16)(13) NAR--Nurse Aide Registry. The registry described in Texas Health and Safety Code, §250.001(1), and available on the DADS Internet website.

(17)(14) Neglect--Is defined by the statute or rule that governs the investigation of alleged neglect of a person receiving facility or agency services, or an individual using the consumer directed services option.

(18)(15) Reportable conduct—Reportable conduct as defined in Texas Health and Safety Code, Chapter 253.001 includes:

(a) abuse or neglect that causes or may cause death or harm to an individual using the consumer-directed services option or a consumer;

(b) sexual abuse of an individual using the consumer-directed service option or a consumer;

(c) financial exploitation of an individual using the consumer-directed service option or a consumer in the amount of \$25 or more; and

(d) emotional, verbal, or psychological abuse that causes harm to an individual using the consumer directed service option or a consumer.

~~Is defined by the statute or rule used by the state agency responsible for the investigation.~~

(19)(16) SOAH--State Office of Administrative Hearings. A state agency responsible for conducting administrative hearings for other state agencies, including DADS.

Chapter 93, Employee Misconduct Registry (EMR)

§93.3. Employment and Registry Information.

(a) Before a facility, ~~or~~ agency, or individual employer hires an employee, the facility, ~~or~~ agency, or individual employer or FMSA on behalf of an individual employer must search the EMR and NAR to determine if the person applying for employment is listed as unemployable on either registry.

(b) A facility, ~~or~~ agency, or individual employer must not hire or continue to employ a person listed in the EMR or NAR as unemployable.

(c) Within five working days after hiring an employee a ~~A~~ facility, ~~or~~ agency, or individual employer must provide written information about the EMR to an employee including: within five working days after hiring the employee. ~~The information must:~~

~~(1) be in writing~~

~~(1)(2) state~~ that a person listed in the EMR is not employable by a facility or agency, or individual employer ~~be in writing~~; and

~~(2)(3) that the EMR is governed by 40 Texas Administrative Code, Chapter 93 include a reference to this chapter and Chapter 253, Texas Health and Safety Code, Employee Misconduct Registry.~~

(d) A facility, ~~or~~ agency, individual employer or FMSA on behalf of an individual employer must search the EMR and NAR annually to determine if an employee is listed on either registry as unemployable.

(e) A facility, ~~or~~ agency, or individual employer must maintain a copy of the results of the searches required by subsections (a) and (d) of this section in the facility or individual employer's books and records ~~person's personnel file~~.

Chapter 93, Employee Misconduct Registry (EMR)

§93.4. Investigations.

(a) DADS investigates allegations of abuse, neglect, and exploitation made against an employee of a facility.

(b) The Department of Family and Protective Services investigates allegations of abuse, neglect, and exploitation made against an employee of an agency, or of an individual employer.

(c) If DADS determines that a substantiated allegation of abuse, neglect, or exploitation by an employee of a facility meets the definition of reportable conduct, DADS follows is ~~responsible for the provision of due process~~ described in §§93.5, 93.6, and 93.7 of this chapter (relating to DADS Investigates: Notice to Employee of Reportable Conduct, DADS Investigates: Informal Review, and DADS Investigates: Notice of Opportunity for Administrative Hearing).

(d) Sections 93.5, 93.6, and 93.7 of this chapter apply only to an investigation conducted by DADS, as described in subsection (a) of this section.

Chapter 93, Employee Misconduct Registry (EMR)

§93.5. DADS Investigates: Notice to Employee of Reportable Conduct.

(a) After an investigation in which DADS determines that an employee of a facility has committed reportable conduct, DADS sends the employee a written notice that includes:

(1) a brief summary of the findings and facts on which the findings of reportable conduct ~~is are~~ based;

(2) a statement that the employee may request an IR by DADS to dispute the findings;

(3) a statement that a request for an IR must be made no later than 10 calendar days after the date the employee receives the written notice; and

(4) the address and telephone number for the local DADS regional office where an employee may request an IR.

(b) An employee of a facility may dispute these findings by requesting an IR within the required time frame to request an IR.

Chapter 93, Employee Misconduct Registry (EMR)

§93.6. DADS Investigates: Informal Review.

(a) If an employee of a facility requests an IR, DADS sets an IR date no later than 30 calendar days after the date the request is received by DADS. ~~to allow the employee to dispute the findings by providing testimony, in person or by telephone, and supporting documentation to a designated, impartial Regulatory Services Division staff person at the local DADS regional office.~~

(1) DADS designates an impartial Regulatory Services Division staff person at the local DADS regional office to conduct the IR.

(2) The employee may dispute the finding by providing oral testimony in person or by telephone and providing supporting documentation to the designated staff person.

(3)(4) If the designated staff person does not uphold the findings, DADS does not record the employee's name or related information in the EMR.

(4)(2) If the designated staff person upholds the findings, DADS notifies the employee of the results of the IR. The employee is then entitled to notice of an opportunity for an administrative hearing, as described in §93.7 of this chapter (relating to DADS Investigates: Notice of Opportunity for Administrative Hearing).

(b) If the employee of a facility does not request an IR, or fails to appear for a requested IR, DADS notifies the employee that an IR was not requested. The employee is then entitled to notice of an opportunity for an administrative hearing, as described in §93.7 of this chapter.

Chapter 93, Employee Misconduct Registry (EMR)

§93.7. DADS Investigates: Notice of Opportunity for Administrative Hearing.

(a) After the informal review process is completed for an employee of a facility, DADS reviews the findings and supporting documentation and sends the employee a written notice that includes:

- (1) a brief summary of the results of the IR findings;
- (2) a statement that the employee may request an administrative hearing on the reportable conduct;
- (3) a statement that a request for hearing must be made in writing no later than 30 calendar days after the date the employee receives the written notice; and
- (4) the address and telephone number for the Health and Human Services Commission Hearings Division where the employee may request an administrative hearing.

(b) If the employee of a facility does not request an administrative hearing or fails to respond timely to the written notice, the employee's name and related information is recorded in the EMR.

(c) An employee of a facility may request an administrative hearing conducted in accordance with the Health and Human Services Commission's administrative hearing procedures in Title 1, Texas Administrative Code, Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

(d) If an employee of a facility requests a hearing, the employee is granted an administrative hearing on the incident of reportable conduct before an administrative law judge at SOAH. The hearing must be completed within 120 days after the date that the request for the hearing is received.

(e) The administrative law judge issues a proposal for decision finding that the employee of a facility either did or did not commit reportable conduct.

(f) The information described in §93.8(c) of this chapter (relating to Entering Information in the EMR) regarding an employee is recorded in the EMR if, after reviewing the proposal for decision, the commissioner or the commissioner's designee issues a final order finding that the employee committed reportable conduct.

Chapter 93, Employee Misconduct Registry (EMR)

§93.8. Entering Information in the EMR.

(a) DADS ~~enters records information~~ in the EMR information described in subsection (c) of this section regarding an employee:

(1) when DADS investigates and all due process procedures are completed for a substantiated finding of reportable conduct;

(2) as required by Texas Health and Safety Code, §253.0075, when DADS receives notice of a substantiated finding of reportable conduct from the Department of Family and Protective Services (DFPS);

(3) as a finding of reportable conduct when DADS finds that a nurse aide working in a nursing facility has committed abuse, neglect, or misappropriation (as those terms are defined in §94.2 of this title (relating to Definitions) and DADS lists the nurse aide's certification as revoked on the NAR; or

(4) if a federal or another state governmental entity finds that an employee has committed an act that constitutes reportable conduct.

(b) DADS does not offer an informal review as described in §93.6 of this chapter (relating to DADS Investigates: Informal Review) or an administrative hearing as described in §93.7 of this chapter (relating to DADS Investigates: Notice of Opportunity for Administrative Hearing) to an employee regarding a finding of reportable conduct as described in paragraphs (2), (3), or (4) of subsection (a) of this section before entering a finding in the EMR.

(1) For a finding under paragraph (3) of subsection (a) of this section DADS provides due process before listing a nurse aide's certification as revoked in the NAR.

(2) For a finding under paragraph (2) or (4) of subsection (a) of this section DFPS, a federal agency, or an agency of another state provides the due process required by its laws, rules or regulations before sending a finding to DADS.

~~The due process procedure offered to an employee by DFPS, a federal or other state governmental entity, or DADS before a finding of abuse, neglect, or misappropriation is entered in the NAR or a finding of reportable conduct is entered in the EMR satisfies the due process required for listing the individual as unemployable in the EMR. DADS does not provide the employee with another informal review or administrative hearing, as described in §93.6 of this chapter (relating to DADS Investigates: Informal Review) or §93.7 of this chapter (relating to DADS Investigates: Notice of Opportunity for Administrative Hearing).~~

(c) The following information is entered in the EMR in accordance with Texas Health and Safety Code, §253.007 (relating to Employee Misconduct Registry):

(1) the employee's name;

- (2) the employee's address;
- (3) the employee's social security number;
- (4) the name of the facility or agency;
- (5) the address of the facility or agency;
- (6) the date the reportable conduct was committed; and
- (7) a description of the reportable conduct committed.

(d) The following information is entered in the EMR for the CDS option in accordance with Texas Health and Safety Codes §253.007 (relating to Employee Misconduct Registry):

- (1) the employee's name;
- (2) the employee's address;
- (3) the employee's social security number;
- (4) CDS Option;
- (5) city and state of the individual employer;
- (6) the date of the act: and
- (7) a description of the act.

Chapter 93, Employee Misconduct Registry (EMR)

§93.9. Removing Information from the EMR.

An employee's name remains in the EMR unless DADS may remove an employee's name from the EMR if:

(1) DADS determines that the employee does not meet the requirements for listing in the EMR based on additional information gathered by DADS or notification received from the Department of Family and Protective Services or another referring entity; or

(2) an entry of reportable conduct in the EMR was based on an entry in the NAR and the entry in the NAR is subsequently removed.