The existing rules for the Employee Misconduct Registry (EMR) in Texas Administrative Code [Title 40, Chapter 93](https://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=4&ti=40&pt=1&ch=93&rl=Y), are being repealed entirely. The new rules for the EMR will be located in Texas Administrative Code, Title 26, Chapter 561. This draft:

* Updates definitions
* Replaces the Texas Department of Aging and Rehabilitative Services with the Texas Health and Human Services Commission
* Updates informal review process

TITLE 26 SOCIAL SERVICES AND ASSISTANCE

PART 1 HEALTH AND HUMAN SERVICES

CHAPTER 561 EMPLOYEE MISCONDUCT REGISTRY (EMR)

§561.1. Purpose.

(a) This chapter implements Texas Health and Safety Code (THSC), Chapter 253, Employee Misconduct Registry (EMR), regarding investigating an allegation of abuse, neglect, or exploitation, and entering information in the EMR about a finding of reportable conduct by an unlicensed employee of a facility, of an agency, or of an individual employer.

(b) The Texas Health and Human Services Commission maintains the EMR and enters information in the EMR in accordance with §561.8 of this chapter (relating to Entering Information in the EMR).

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

§561.2. 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 an individual using the CDS option or receiving facility or agency services.

(2) Administrative law judge--An administrative law judge from the Texas State Office of Administrative Hearings (SOAH) who is authorized to preside over certain administrative hearings under this chapter and in accordance with Texas Government Code, Chapter 2001.

(3) Administrative hearing--A contested case hearing conducted under this chapter by SOAH based on a written request for hearing by an employee contesting the Texas Health and Human Services Commission’s (HHSC’s) determination that the employee committed reportable conduct.

(4) Agency--In this chapter means:

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

(B) a person exempt from licensing under THSC §142.003(a)(19);

(C) a facility for persons with an intellectual disability or related conditions licensed under THSC Chapter 252;

(D) a state supported living center as defined in THSC §531.002;

(E) a local authority designated under THSC §533.035;

(F) a community center as defined in THSC §531.002;

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

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

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

(5) CDS option--Consumer directed services option. A service delivery option, described in Texas Administrative Code, Title 40, Chapter 41 (relating to Consumer Directed Services Option), in which an individual or legally authorized representative (LAR) employs and retains service providers and directs the delivery of program services.

(6) 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) Executive Commissioner--The executive commissioner of HHSC.

(8) Employee--A person who:

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

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

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

(9) Employee Misconduct Registry (EMR)--The registry described in THSC, Chapter 253, and available on the HHSC Internet website.

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

(11) Facility--In this chapter means:

(A) a nursing facility licensed under THSC, Chapter 242;

(B) an assisted living facility licensed under THSC, Chapter 247;

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

(D) a home and community support services agency licensed under THSC, Chapter 142, as a hospice inpatient unit or 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 HHSC; or

(G) a prescribed pediatric extended care center licensed under THSC, Chapter 248A.

(12) Financial management services agency (FMSA)--As defined in Texas Administrative Code, Title 40, Chapter 41 §41.103 (relating to Definitions), an entity that contracts with HHSC to provide financial management services to individuals who use the CDS option.

(13) Individual employer--An employer, as defined in Texas Administrative Code, Title 40, Chapter 41 §41.103, which is an individual or LAR who participates in the CDS option and is responsible for hiring and retaining service providers to deliver program services.

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

(15) Neglect--Is defined by the statute or rule that governs the investigation of alleged neglect of an individual using the CDS option or receiving facility or agency services.

(16) Nurse Aide Registry (NAR)--The registry described in THSC §250.001(1), and available on the HHSC website.

(17) Reportable conduct--Reportable conduct, as defined in THSC §253.001, which includes:

(A) abuse or neglect that causes or may cause death or harm to an individual using the CDS option or receiving facility or agency services;

(B) sexual abuse of an individual using the CDS option or receiving facility or agency services;

(C) financial exploitation of an individual using the CDS option or receiving facility or agency services in the amount of $25 or more; and

(D) emotional, verbal, or psychological abuse that causes harm to an individual using the CDS option or receiving facility or agency services.

(18) State Office of Administrative Hearings (SOAH)--The state agency responsible for conducting certain administrative hearings for other state agencies, including HHSC.

(19) THSC--Texas Health and Safety Code.

§561.3. Employment and Registry Information.

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

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

(c) A facility, agency, or individual employer must, within five working days after hiring an employee, provide written information to the employee explaining:

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

(2) that the EMR is governed by this chapter and THSC, Chapter 253.

(d) A facility, 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, individual employer, or FMSA on behalf of an individual employer must maintain a copy of the results of the searches required by subsections (a) and (d) of this section in the books and records maintained by the entity that conducted the search.

§561.4. Investigations.

(a) The Texas Health and Human Services Commission (HHSC) investigates certain allegations of abuse, neglect, and exploitation made against an employee of a facility.

(b) If HHSC determines that a substantiated allegation of abuse, neglect, or exploitation by an employee of a facility meets the definition of reportable conduct, HHSC complies with §§561.5, 561.6, and 561.7 of this chapter (relating to HHSC Investigates: Notice to Employee of Reportable Conduct, HHSC Investigates: Informal Review, and HHSC Investigates: Notice of Opportunity for Administrative Hearing).

(c) Sections 561.5, 561.6, and 561.7 of this chapter apply only to an investigation conducted by HHSC, as described in subsection (a) of this section.

§561.5. HHSC Investigates: Notice to Employee of Reportable Conduct.

(a) After an investigation in which the Texas Health and Human Services Commission (HHSC) finds that an employee of a facility has committed reportable conduct, HHSC sends the employee a written notice that includes:

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

(2) a statement that the employee may request an informal review (IR) by HHSC to dispute the finding;

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

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

(b) An employee of a facility may dispute the finding by requesting an IR in writing no later than 10 calendar days after the date the employee received the written notice described in subsection (a) of this section.

§561.6. HHSC Investigates: Informal Review.

(a) If an employee of a facility requests an informal review (IR) in accordance with §561.5(b) of this chapter (relating to HHSC Investigates: Notice to Employee of Reportable Conduct), the Texas Health and Human Services Commission (HHSC) sets an IR date no later than 30 calendar days after the date the request is received by HHSC.

(1) Designated HHSC staff who did not perform the investigation or directly supervise staff conducting the investigation, conduct the IR and ensure that impartiality and consistency in the conduct of IRs are maintained.

(2) The employee may dispute the investigative finding of reportable conduct by providing oral testimony by providing supporting information or documentation to the designated staff person.

(3) If the designated HHSC staff does not uphold the investigative finding of reportable conduct, HHSC notifies the employee of the results of the IR and does not enter the employee's name or related information in the Employee Misconduct Registry.

(4) If designated HHSC staff uphold the investigative finding of reportable conduct, HHSC sends written notice to the employee, as described in §561.7(a) of this chapter (relating to HHSC Investigates: Notice of Opportunity for Administrative Hearing).

(b) If an employee of a facility does not timely request an IR or fails to appear for a requested IR, HHSC sends the employee the written notice described in §561.7(a) of this chapter, except that the notice does not include a summary of the results of an IR.

§561.7. HHSC Investigates: Notice of Opportunity for Administrative Hearing.

(a) Except as provided in §561.6(b) of this chapter (relating to HHSC Investigates: Informal Review), written notice sent to an employee in accordance with §561.6(a)(4) or (b) includes:

(1) a summary of the results of the IR;

(2) a statement that the employee may request an administrative hearing on the finding of 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 for the HHSC Legal Services Division where the employee may request an administrative hearing.

(b) If the employee of a facility does not request an administrative hearing, the employee's name and related information are entered in the Employee Misconduct Registry (EMR).

(c) An employee of a facility may request an administrative hearing conducted in accordance with the Texas Health and Human Services Commission's administrative hearing procedures in Texas Administrative Code, Title 40, Chapter 91, Subchapter A (relating to SOAH Hearings Under the Administrative Procedure Act).

(d) If an employee of a facility timely requests a hearing, the employee is granted an administrative hearing on the finding of reportable conduct before an administrative law judge at SOAH. THSC §253.004 requires a hearing to be completed no later than 120 days after 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 §561.8(c) of this chapter (relating to Entering Information in the EMR) regarding an employee is entered 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.

§561.8. Entering Information in the EMR.

(a) The Texas Health and Human Services Commission (HHSC) enters the information described in subsection (c) of this section in the Employee Misconduct Registry (EMR):

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

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

(3) as a finding of reportable conduct when HHSC finds that a nurse aide working in a nursing facility has committed abuse, neglect, or misappropriation (as those terms are defined in §561.2 of this chapter (relating to Definitions)) and HHSC lists the nurse aide's certification as revoked on the Nurse Aide Registry (NAR); or

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

(b) HHSC does not offer an informal review (IR), as described in §561.6 of this chapter (relating to HHSC Investigates: Informal Review), or an administrative hearing, as described in §561.7 of this chapter (relating to HHSC Investigates: Notice of Opportunity for Administrative Hearing), to an employee regarding a finding of reportable conduct described in subsection (a)(2), (3), or (4) of this section before entering information related to the finding in the EMR.

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

(2) For a finding under subsection (a)(2) or (4) of this section, the Department of Family and Protective Services, 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 HHSC.

(c) The following information is entered in the EMR in accordance with THSC §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, or a notation that the employee was an employee of an individual employer;

(5) the address of the facility or agency, or the city and state of the individual employer;

(6) the date the reportable conduct was committed; and

(7) a description of the reportable conduct committed.

§561.9. Removing Information from the EMR.

An employee's name remains in the Employee Misconduct Registry (EMR) unless:

(1) The Texas Health and Human Services Commission (HHSC) determines that the employee does not meet the requirements for listing in the EMR based on additional information gathered by HHSC or notification received from the Texas 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 Nurse Aide Registry (NAR) and the entry in the NAR is subsequently removed.