



STATE OF ARKANSAS
**Department of Finance
and Administration**

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June 24, 2020

Mr. Robbie Nix
413 Briarwood Place
Sulphur Springs, Texas 75482

RE: Advisory Opinion No. 2020-07

Dear Mr. Nix:

This letter is in response to your written request for a waiver pursuant to Arkansas Code Annotated §19-11-715(b), which was sent to me on June 3, 2020, in regard to your previous employment with the Arkansas Department of Human Services (DHS) and your current employment as a subcontractor with Milliman, Inc. (Milliman).

This opinion is based upon the following information that you have presented to me and upon which I am relying. It should be noted that if one or more of these items of information are later shown to be incorrect, then that could result in a revised opinion.

1. You were paid as an employee at DHS from January 2008 to February 2020 (though you were still listed as a DHS extra-help employee in the system through June 17);
2. In your most recent role at DHS, you served as the Organized Care Plan Manager for the Division of Medical Services (DMS), and your responsibilities included:
 - a. Being the key project sponsor for implementation of the Provider-Led Arkansas Shared Savings Entity (PASSE) Program, which is a Managed Care program for individuals with high behavioral health needs and individuals with developmental disabilities;
 - b. Serving as a lead for DMS regarding systems changes, provider communication, interagency communication, and external stakeholder communication for Organized Care entities;
 - c. Ensuring Organized Care organizations complied with applicable state and federal law;
 - d. Assisting with writing federal waivers, Managed Care Organization (MCO) contracts, and Medicaid Provider manuals for the PASSE Program; and
 - e. Being responsible for contract monitoring of rate/capitation development for the PASSE Program.
3. You relocated out of state and became a subcontractor at Milliman upon the termination of your paid employment at DHS;

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4. Your responsibilities at Milliman include:
 - a. Providing consultation on policy and operations of Arkansas Medicaid programs;
 - b. Performing and providing consultation on activities and projects as requested or assigned by DHS;
 - c. Performing financial analysis for DHS programs including, but not limited to, AR Works, PASSE, Dental, and Non-Emergency Transportation;
 - d. Utilizing analytical techniques and conducting other activities for DHS on Arkansas Medicaid programs; and
 - e. Analyzing and reporting on data contained with the DHS data warehouse.
5. While you were employed at DHS, you were not responsible for the selection or procurement of the Milliman contract; and
6. While you were employed at DHS, you were not responsible for reporting on any Milliman-related deliverables within the awarded contract.

In addition, the following information has been provided:

7. DHS issued Invitation for Bid No. 710-18-1005 on December 29, 2017 for actuarial consulting services including analyses of new and existing programs and populations, Medicaid waiver assistance, rate development and verification, budget modeling, benefit and reimbursement studies, and long-term services and support assistance;
8. The state awarded the contract to Milliman on March 9, 2018;
9. As the contract is being renewed, the request for an advisory opinion has been sent to me pursuant to section 19-11-715(b);
10. Paula Stone, DMS Deputy Director, avers in a letter of support for your request for an advisory opinion related to your position with Milliman, DHS's contracted actuarial firm, that you did not have any official responsibilities in regard to the Milliman contract: you were not involved in the procurement of that contract, did not serve as the contract manager, and had no oversight over contract performance or payment;
11. Ms. Stone states that, during your state employment, you worked as a subject matter expert for DMS and assisted in rate development for PASSE with Milliman and other DHS staff, which work did not involve direct oversight of the contract or Milliman; and
12. Ms. Stone also states that you often serve as a subject matter expert on behalf of Arkansas Medicaid, which is one reason that you are an asset to the state.

I. Relevant Law

In regard to former state employees and matters connected with their former duties, Arkansas Code Annotated § 19-11-709(b)(1) permanently disqualifies former employees from knowingly acting as a principal or as an agent for anyone other than the state in connection with any contract in which the former employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the state is a party or has a direct and substantial interest. *See* Arkansas Code Annotated § 19-11-709(b)(1).

Another ethical restriction addresses a one-year representation restriction regarding matters for which a former employee was officially responsible. Arkansas Code Annotated § 19-11-

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709(b)(2) provides that it is a breach of ethical standards for any former state employee, within one year after cessation of the former employee's official responsibility in connection with any contract to knowingly act as a principal or as an agent for anyone other than the state in matters which were within the former employee's official responsibility, where the state is a party or has a direct or substantial interest. *Id.* The latter restriction only applies for one year after cessation of the former employee's official responsibility in connection with any contract at issue. *Id.*

For purposes of interpreting Arkansas Code Annotated §19-11-701 *et seq.*, section 19-11-701(8) defines "employee" as "an individual drawing a salary from a state agency, whether elected or not, and any nonsalaried individual performing personal services for any state agency." "State agency" is defined in section 19-11-701(16) as meaning "any office, department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the executive, judicial, or legislative branch of this state."

The public policy underlying section 19-11-701 *et seq.* is to "promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the state." *See* Arkansas Code Annotated § 19-11-703(a). "The policy is implemented by prescribing essential restrictions against conflict of interest without creating unnecessary obstacles to entering public service." *Id.* The intent is to require state employees to "discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors," and to "conduct themselves in such a manner as to foster public confidence in the integrity of the state procurement organization." *See* Arkansas Code Annotated § 19-11-703(b). These statutes are a codification of, and can be understood against, the common law, which forbade public officials from engaging in self-dealing in regard to contracts. *See Price v. Edmonds*, 232 Ark. 381, 337 S.W.2d 658 (1960).

Arkansas Code Ann. § 19-11-715(b) gives the Secretary of the Department of Finance and Administration (DF&A) authority to, upon written request of an employee or contractor and in consultation with the Attorney General, render an advisory opinion regarding the appropriateness of the course of conduct to be followed in proposed transactions.

II. Analysis

As a threshold matter, I reiterate that I am relying upon the representations that you have presented to me and those that have been relayed to me by Ms. Stone. As noted above, section 19-11-715(b) gives me authority, as the Secretary of DF&A, to issue an advisory opinion, upon written request of employees or contractors and in consultation with the Attorney General, regarding the appropriateness of the course of conduct to be followed. It does not, however, confer upon me the authority to subpoena documents, compel sworn statements, or utilize other investigative tools entrusted to judicial officers and law enforcement. Consequently, the employee or former employee, contractor and contracting agency are in superior positions to ascertain the relevant facts and, beyond doing basic due diligence in researching publicly available information, I rely upon the information provided to me in analyzing and formulating my opinions. This opinion is limited to the representations submitted to me and is withdrawn in the event that any of the material information presented to me proves to be false.

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Based on the submitted information as applied to the above-cited statutory provisions, your former employment with DHS certainly classifies you as a former state employee and, given that you ended your paid employment with DHS in February 2020 (and you were officially terminated from the system in June of 2020), the one year statutory “cooling off” period has not yet expired.

The salient questions before me then are: 1) whether you participated personally and substantially in connection with any Milliman contract, in which case a permanent prohibition for you applies, and 2) whether the Milliman contract requires you to act as a principal or an agent for anyone other than the state in matters that were within your former official responsibility as a state employee, in which case you would be barred for one year.

In trying to illuminate the intent of the statute regarding former state employees, Arkansas Code Annotated § 19-11-709(e)(1) clarifies that section 19-11-709 is “not intended to preclude a former employee from accepting employment with private industry solely because his or her employer is a contractor with this state.” Additionally, section 19-11-703(a) reflects a legislative desire to avoid creating unreasonable obstacles for those in public service. Taken together, then, these provisions make clear that the restrictions should not be construed in an overly broad manner that reaches beyond true conflicts of interest, but should be balanced against the legislative intent to avoid unnecessary restrictions and construed pragmatically and with common sense so as to prevent actual conflicts of interest and self-dealing.

In reviewing the information that you have provided, specifically that you were neither responsible for the selection or procurement of the Milliman contract nor were you responsible for reporting on any Milliman-related deliverables within the awarded contract, I am persuaded that you did not participate personally and substantially in connection with any Milliman contract while an employee of the state. Therefore, a permanent bar does not apply in your case.

In addressing whether the Milliman contract requires you to act as a principal or an agent for anyone other than the state in matters that were within your former official responsibility as a state employee, in which case you would be barred for one year, I note that a touchstone consideration is whether the former employee had authority to direct state action in such a way as to personally benefit from it upon entering private sector employment. Merely having been employed by the state, without that state employment being potentially used for direct self-benefit, is not enough. This is a fact-specific determination that should be reviewed on a case by case basis.

In regard to your former responsibilities at DHS, you stated in your request letter that your role included being the key project sponsor for implementation of the PASSE Program, assisting with writing Medicaid Provider manuals for the PASSE Program, and being responsible for contract monitoring of rate and capitation development for the PASSE Program.

You also stated that your current work responsibilities at Milliman include providing consultation on policy and operations of Arkansas Medicaid programs, performing financial analysis for DHS programs (specifically PASSE), and utilizing analytical techniques and conducting other activities for DHS on Arkansas Medicaid programs.

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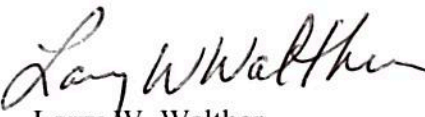
As noted above, whether you had authority to direct state action in such a way as to personally benefit from it upon entering the private sector employment is a key consideration in my analysis. Based on the provided information, I am persuaded that you did not have authority to direct state action in a way that benefited you personally upon becoming a Milliman employee.

Furthermore, while your duties as a Milliman employee involve some of the same duties that you performed at DHS, you are conducting these services on behalf of the state in which the interests of Milliman align with those of the state through its contractual duties as DHS's actuarial consultant. Pursuant to the statutory language of section 19-11-709(b) and (c), the offending behavior occurs when the former employee acts as a "principal or as an agent for anyone other than the state." As your services are being rendered through Milliman's contract with the state, there is no conflict of interest.

III. Decision

Thank you for seeking my counsel and approaching the issue with transparency. I am persuaded that, under the representations as stated above, there is no conflict of interest, and this advisory opinion is issued in accordance with section 19-11-715(b). Compliance with the above course of conduct is deemed to constitute compliance with the ethical standards of Arkansas Code Annotated §19-11-701 *et seq.* and Executive Order 98-04.

Sincerely,



Larry W. Walther
Secretary

Attachment

cc: Edward Armstrong, Office of State Procurement
Amy Fecher, Secretary