

A Proposed Model Consent Form to Protect Employers and Their Employees from Civil Lawsuits While Preventing “Pass the Harasser” Recommendations: The Arkansas Approach

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ABSTRACT

With the passage of Act 369 during the 2025 Regular Session, the 95th General Assembly of the Arkansas State Legislature amended A.C.A. § 11-3-204 concerning the information that may be disclosed by a current or former employer to a prospective employer. With the amendment, a method is provided whereby current and former employers may provide information to prospective employers about an applicant, including substantiated allegations of sexual abuse or sexual harassment or the applicant's resignation during a pending investigation of an allegation of sexual abuse or sexual harassment.

I. INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) has stated that prevention is the best tool to eliminate sexual harassment in the workplace.ⁱ Employers are encouraged by the EEOC to take steps necessary to prevent sexual harassment from occurring.ⁱⁱ However, to avoid potential litigation, employers may be reluctant to respond to reference inquiries by a prospective employer about an employee (current or former), particularly when the current or former employee was associated with a claim of sexual harassment. The purpose of this paper is to educate employers, both former and prospective, about the development of a model, state-law compliant, consent form to provide immunity from civil liability for providing information in good faith about an employee. With the passage of Act 369 during the 2025 Regular Session of the 95th General Assembly of the Arkansas State Legislature, Arkansas employers have now been given an additional tool that will enable them to take precautionary steps during the hiring process. Specifically Act 369 amends A.C.A. §11-3-204 to allow a current or former employer, with written consent from its current or former employee, to disclose to a prospective employer information regarding substantiated allegations of sexual abuse or harassment by the current or former employee, or in the alternative, information about the applicant's resignation during a pending investigation of an allegation of sexual abuse or sexual harassment against the applicant.

II. BACKGROUND

The origins of A.C.A. § 11-3-204 can be traced back to the passage of Act 1474 of 1999 in the 82nd General Assembly of the Arkansas State Legislature.

A. Act 1474 of 1999

The titled of Act 1474 of 1999 was:

AN ACT TO PROVIDE CURRENT AND FORMER BUSINESS EMPLOYERS WITH PROTECTION FOR PROVIDING JOB INFORMATION ABOUT CURRENT OR FORMER EMPLOYEES TO PROSPECTIVE EMPLOYERS; AND FOR OTHER PURPOSES.ⁱⁱⁱ

For the first time, Arkansas had a law that, with an employee's written consent, permitted a current or former employer to provide prospective employers specific job information about the current or former employee. It is important to note that this new law also gave the former employer immunity from suit for making the disclosure, subject to certain exceptions.

Act 1474 of 1999 was composed of five sections. Section One provided as follows:

SECTION 1. (a) A current or former employer may disclose the following information about a current or former employee's employment history to a prospective employer of the current or former employee upon receipt of written consent from the current or former employee:

- (1) Date and duration of employment;
- (2) Current pay rate and wage history;
- (3) Job description and duties;
- (4) The last written performance evaluation prepared prior to the date of the request;
- (5) Attendance information;
- (6) Results of drug or alcohol tests administered within one (1) year prior to the request;
- (7) Threats of violence, harassing acts, or threatening behavior related to the workplace or directed at another employee;
- (8) Whether the employee was voluntarily or involuntarily separated from employment and the reasons for the separation; and
- (9) Whether the employee is eligible for rehire.

(b) The current or former employer disclosing such information shall be presumed to be acting in good faith and shall be immune from civil liability for the disclosure or any consequences of such disclosure unless the presumption of good faith is rebutted upon a showing, by a preponderance of the evidence, that the information disclosed by the current or former employer was false and the current or former employer had knowledge of its falsity or acted with malice or reckless disregard for the truth.^{iv}

Section Two of Act 1474 of 1999 states:

SECTION 2. The consent required in Section 1 must be on a separate form from the application form, or, if included in the application form, must be in bold letters and in

larger typeface than the largest typeface in the text of the application form. The consent form must state, at a minimum, language similar to the following:

“I, (applicant), hereby give consent to any and all prior employers of mine to provide information with regard to my employment with prior employers to (prospective employer).” The consent must be signed and dated by the applicant. The consent will be valid only for the length of time that the application is considered active by the prospective employer, but in no event longer than six (6) months.^v

Section Three of Act 1474 of 1999 provides:

SECTION 3. The provisions of this act shall also apply to any current or former employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with the provisions of this act.^{vi}

Section Four of Act 1474 of 1999 sets out the following:

SECTION 4. (a) This act does not require any prospective employer to request employment history on a prospective employee and does not require any current or former employer to disclose employment history to any prospective employer.

(b) Except as specifically amended herein, the common law of this state remains unchanged as it relates to providing employment information on present and former employees.

(c) This act shall only apply to causes of action accruing on and after the effective date of this act.^{vii}

Section Five of Act 1474 of 1999 is as follows:

SECTION 5. The immunity conferred by this act shall not apply when an employer or prospective employer discriminates or retaliates against an employee because the employee or the prospective employee has exercised, or is believed to have exercised, any federal or state statutory right or undertaken any action encouraged by the public policy of this state.^{viii}

Act 1474 of 1999 was subsequently codified by the Arkansas Code Revision Commission as A.C.A. §11-3-204.^{ix} This state statute existed in its original form until it was amended in 2013.

B. Act 1039 of 2013

In 2013, the 89th General Assembly of the Arkansas State Legislature amended A.C.A. §11-3-204 to specifically expand its coverage to school districts and, in the specific instance of a school district, to drop the requirement of consent from the current or former employee prior to disclosing the information listed in A.C.A. §11-3-204 (a)(1). The amendment adds paragraph (a)(2) as follows:

(2) A school district or an officer, an agent, a servant, or an employee of a school district may disclose the information under subdivision (a)(1)(A)-(I) of this section

and any additional information that may have some bearing upon the hiring of a current or former employee by a school district with or without the written consent of the current or former employee.^x

A.C.A. §11-3-204 would be amended again two years later.

C. Act 949 of 2015

In 2015, the 90th General Assembly of the Arkansas State Legislature made two amendments to A.C.A. §11-3-204 with the passage of Act 949 of 2015. The first change was to add a new section to A.C.A. §11-3-204 (a) as follows:

- (4) The current or former employer disclosing the information may present the information in a format convenient to the current or former employer, including any electronic format.^{xi}

The second change affected the consent language contained in paragraph (b). Specifically, Act 949 of 2015 amended A.C.A. 11-3-204(b)(3) to add two paragraphs that put a shelf-life on the consent form. Specifically, the new language provided:

(B) If the applicant is hired and remains with the new employer for longer than six (6) months, the consent shall be valid for ~~but in no event no~~ longer than six (6) months.

(C) If the applicant is hired and remains with the new employer for less than six (6) months, the consent shall be valid for six (6) months after the termination of employment.^{xii}

III. DISCUSSION

Since its inception in 1999, with the exception of the two amendments referenced above, A.C.A. §11-3-204 has sat quietly on the Arkansas books for twenty-six years. Then in the spring of 2025, it was amended again by the 95th General Assembly of the Arkansas State Legislature.

A. Act 369 of 2025

Act 369 of 2025 amends A.C.A. §11-3-204 by adding to paragraph (a)(1) of the statute additional information that may be disclosed by a current or former employer to a prospective employer. The amendment is as follows:

A substantiated allegation of sexual abuse or sexual harassment by the employee, or the resignation by a former employee during a pending investigation of an allegation of sexual abuse or sexual harassment against the former employee;^{xiii}

Pursuant to the Arkansas Constitution, Act 369 of 2025 will become effective August 5, 2025.^{xiv}

B. Potential impact

Generally, a former employer does not have a general legal duty to disclose to the public that an employee was fired as a result of a sexual harassment investigation.^{xv} Conversely, sexual harassment is, and has been, an issue in the workplace at both the national level, and for the State of Arkansas specifically. Consider the following information from the April 2022 EEOC Data Highlight No. 2 addressing sexual harassment in the nation's workplaces:

- Between FY 2018 and FY 2021, the EEOC received a total of 98,411 charges alleging harassment under any basis and 27,291 charged alleging sexual harassment.^{xvi}
- Between FY 2018 and FY 2021, sexual harassment charges accounted for 27.7% of all harassment charges.^{xvii}
- Women filed 78.2% of the 27,921 sexual harassment charged received between FY 2018 and FY 2021.^{xviii}
- During FY 2018-FY2021, the State of Arkansas ranked number six in the top ten states with the most sexual harassment charges.^{xix}

The EEOC's data reveals sexual harassment is a pervasive issue in the work place at the national level, as well at the state level for Arkansas. The passage of Act 329 of 2025 squarely addresses the issue of sexual harassment or sexual abuse by an employee, either as a substantiated allegation, or resignation of the employee during a pending investigation. Prospective employers in Arkansas now have a set of tools that can dramatically reduce sexual harassment in the workplace by giving prospective employers advanced knowledge of prior behavior of an applicant who either formerly engaged in sexual harassment or abuse or quit their employment during the investigation of their alleged sexual harassment or abuse. This foreknowledge can have the effect of preventing a "pass of the harasser" from one employer to another.

C. Proposed Model Consent Form

A.C.A. §11-3-204(b) addresses the parameters of the consent form that may be signed by the applicant. Pursuant to the requirements of the statute, the consent form shall be on a separate form from the application or, if the consent form is included in the application form, is must be in bold letters and in larger typeface that the largest typeface in the text of the application form.^{xx} Further, the statute requires that the consent form state, at a minimum, language similar to the following and be signed and dated by the applicant:

"I, (applicant), hereby give consent to any and all prior employers of mine to provide information with regard to my employment with prior employers to (prospective employer)."^{xxi}

A proposed model consent form that a prospective Arkansas employer could utilize on or after Act 369 of 2025's August 5, 2025, effective date would be as follows:

CONSENT FOR PRIOR EMPLOYERS TO RELEASE INFORMATION TO PROSPECTIVE EMPLOYER REGARDING APPLICANT'S PRIOR EMPLOYMENT

I, (applicant), hereby give consent to any and all prior employers of mine to provide information with record to my employment with prior employers to (prospective employer).

Specifically, the information that may be disclosed by my former employer may include:

- (A) Date and duration of employment;
- (B) Current pay rate and wage history;
- (C) Job description and duties;
- (D) The last written performance evaluation prepared prior to the date of the request;
- (E) Attendance information;
- (F) Results of drug or alcohol tests administered within one (1) year prior to the request;
- (G) Threats of violence, harassing acts, or threatening behavior related to the workplace or directed at another employee;
- (H) A substantiated allegation of sexual abuse or sexual harassment by the employee, or the resignation by a former employee during a pending investigation of an allegation of sexual abuse or sexual harassment against the former employee;
- (I) Whether the employee was voluntarily or involuntarily separated from employment and the reasons for the separation; and (J) Whether the employee is eligible for rehire.

Applicant Printed Name

Applicant Signature

Date Signed

With a properly executed consent form, prospective employers in Arkansas will be able to, and should, make inquiries of prior employers regarding the enumerated items as they pertain to the applicant. This will enable prospective employers to have a wealth of dates to assist them in making well-informed decisions during the hiring process.

D. What happens next?

1. Applicant

The consent form represents a fork in the road for the applicant. Either the applicant will or will not sign the consent form. Failure to complete the consent form could be considered by the employer to be an incomplete application. There is no requirement in the law that an employer consider an applicant who has an incomplete application.

2. Current/prior employers

If the applicant signs the consent form, the prospective employer is now free to reach out to current and former employers. This now brings the current or former employer to a fork in the road. The current or former employer may decide to share relevant information from the categories identified in the consent form with the prospective employer. Conversely, the current or former employer may decide not to share information with the prospective employer. Arkansas law does not require a current or former employer to disclose employment history to a prospective employer.^{xxii}

IV. CONCLUSION

For too long, it has been too easy for employees that have violated the prohibitions against sexual harassment or sexual abuse at their old job to slip anonymously into the stream of applicants, effectively passing the harasser from one employer to the next. The proposed model consent form set out above is specific to Arkansas. At least one other state, Nebraska, has a similar statute.^{xxiii} Employers in other jurisdictions should consult with their legal counsel for advice on the statutory framework, if any, for their particular state on providing employee references. In summary, A.C.A. §11-3-204, as amended by Act 369 during the 2025 Regular Session of the 95th General Assembly of the Arkansas State Legislature, is not a perfect solution to the issue of an applicant who has a history of substantiated sexual harassment or sexual abuse allegations at their current or former employer, or the applicant who resigns during the pending investigation of the same. However, beginning August 5, 2025, it does represent a substantial step forward in the ability of a prospective Arkansas employer to at least have the opportunity to ask the right questions in an overall effort to reduce the possibility of sexual harassment or sexual abuse occurring in the workplace.

ⁱ EEOC. Fact Sheet on Sexual Harassment Discrimination. Fact Sheet (January 15, 1997).

ⁱⁱ *Id.*

ⁱⁱⁱ 1999 Ark. Acts 1474.

^{iv} Act 1474 of 1999

^v *Id.* at 2.

^{vi} *Id.* at 2.

^{vii} *Id.* at 2-3.

viii *Id.* at 3.

ix Ark. Code Ann. §11-3-204

x 2013 Ark. Acts 1039.

xi 2015 Ark. Acts 949.

xii *Id.* at 3.

xiii 2025 Ark. Acts 369.

xiv See Ark. Const., art 5, § 1. Acts without an emergency clause or a specified effective date become effective the day after the deadline to file a referendum petition. Referendum petitions must be filed within 90 days “after the final adjournment of the session.” The 90-day window begins on the first full day after adjournment because the date of *sine die* adjournment itself is not a full day on which one could file a referendum petition.

xv Clarke, J.A. (2018), If You Fire Someone for Sexual Harassment, What Do You Say If You’re Called for a Reference? *Harvard Business Review Digital Articles*, 3/27/2018, p. 3.

xvi Sexual Harassment in Our Nation’s Workplaces. Office of Enterprise Data and Analytics (OEDA) Data Highlight No. 2. U.S. Equal Employment Opportunity Commission (EEOC), Washington, DC, April 2022. Page 1.

xvii *Id.* at 2.

xviii *Id.* at 2.

xix *Id.* at 3. (Figure 8).

xx Ark. Code Ann. § 11-3-204(b)(1)(A).

xxi Ark. Code Ann. § 11-3-204(b)(B).

xxii Ark. Code Ann. § 11-3-204(d).

xxiii Neb. Rev. Stat. §48-201.