Report From Agency

RULEMAKING REPORT TO LEGISLATURE

CLEARINGHOUSE RULE 17-005

Ch. DHS 38

Basis and Purpose of Proposed Rule

The Wisconsin Department of Health Services proposes an order to create chapter DHS 38, relating to drug testing for participants in the FoodShare Employment and Training Program who are able-bodied adults.

Department Response to Legislative Council Rules Clearinghouse Recommendations

The department accepts the recommendations made by the Legislative Council Rules Clearinghouse and has modified the proposed rule where suggested with the exception of five areas: 5(c) The intention is to use a test that will calculate a numeric result, not to be interpreted by an individual, but rather done systematically; 5(d) The rule has been updated to reference federal guidelines for drug testing which specify categories and thresholds for controlled substances and metabolites of controlled substances; 5(h) This section has been removed from the rule; 5(i) This section has been removed from the rule; and 6 The Department does not believe there are conflicts with the federal regulations.

Final Regulatory Flexibility Analysis

The issues raised by each small business during the public hearing(s).

The proposed rules will not have an economic impact on small business.

Any changes in the rule as a result of an alternative suggested by a small business and the reasons for rejecting any of those alternatives.

N/A

The nature of any reports and estimated cost of their preparation by small businesses that must comply with the rule.

N/A

The nature and estimated costs of other measures and investments that will be required by small businesses in complying with the rule.

N/A

The reason for including or not including in the proposed rule any of the following methods for reducing the rule's impact on small businesses, including additional cost, if any, to the department for administering or enforcing a rule which includes methods for reducing the rule's impact on small businesses and the impact on public health, safety and welfare, if any, caused by including methods in rules

N/A

Changes to the Analysis or Fiscal Estimate/Economic Impact Analysis

Analysis

No changes were made to the rule's analysis.

The Fiscal Estimate/Economic Impact Analysis was redrafted using the new DOA-2049 form. Changes to compliance and implementation costs reflect that the State agency will be paying for costs of screening, testing and treatment, which are the required components under the rule.

Public Hearing Summary

The department began accepting public comments on the proposed rule on August 7, 2017. A public hearing was held on August 21, 2017, in Green Bay, WI. Public comments on the proposed rule were accepted until August 28, 2917. An extended period for public comment began on September 5th, 2017 and ended on September 12, 2017.

List of the persons who appeared or registered for or against the Proposed Rule at the Public Hearing.

Registrant	**Position Taken** (Support or Opposed)
Shawn Tessman – Representing an organization	Opposed
Jane Grocholski	Observer
Vanessa Kuettel – Representing Legal Action of Wisconsin	Opposed
Vicki Perron – Representing an organization	Observer
Choua Yang	Observer
Kelly Lambert	Observer
Jean M Leary	Observer

Summary of Public Comments to the Proposed Rule and the Agency's response to those comments, and an explanation of any modification made in the proposed rule as a result of public comments or testimony received at the Public Hearing.

Rule Provision	Public Comment	Department Response
General	DHS received approximately 20 comments relating to the efficacy of the proposed rules. Specifically, the comments critique the rule's ability to "ensure that able-bodied adults who are receiving taxpayer supported workforce training services are work-ready" and "provide individuals who do test positive for an illegal substance a path to treatment" as stated in the plain language analysis of the proposed rule. Commenters highlight that mandatory drug testing and coerced treatment does not align with the standard of care for Substance Use Disorder (SUD) treatment. Wisconsin's proposal does not align with the standard of care for SUD treatment because it coerces participation by making FoodShare employment and training participation contingent upon participation in SUD treatment. The proposed rule for drug testing relies on drug test results as the determining factor for whether or not a patient will be required to participate in a treatment program, which does not align with SUD treatment standard of care, i.e. a positive drug test is not sufficient evidence for a SUD diagnosis and a negative drug test is not sufficient evidence of an individual not having a SUD diagnosis. Chemical testing for presence of controlled substances is a highly ineffective way to identify those in need of treatment. It may catch the occasional user of marijuana (which remains in the system on an ongoing basis) but miss the abuser of alcohol (which is not on chemical screens) or the opioid abuser who has abstained for long enough that substances do not remain in their system. It also cannot distinguish between a person appropriately using prescription painkillers and one who has become addicted (but has a valid prescription). Finally, research shows that a patient's internal readiness	As currently written, the rule complies with requirements of s. 47.79 (9) (d), Wis.Stats., while allowing flexibility to the Department to work collaboratively with stakeholders on the implementation of the rule, once effective. DHS acknowledges that individuals must be ready and willing to seek SUD treatment. DHS 38.06 (3) requires treatment providers to evaluate individuals' need for treatment. A positive drug test will not necessarily lead to a SUD diagnosis. The rule further allows individuals to self-attest to a substance use disorder without needing to take drug test. Those individuals are directly assessed and evaluated for treatment. In response to the argument that drug test results are not sufficient evidence of a SUD diagnosis, the Department will be using chemical testing that is based on HHS guidelines, the national standard for drug testing. The proposed rule allows for use of controlled substances with a valid prescription. DHS will explore ways to promote efficiencies in collecting this information, such as by using the prescription drug monitoring program, to address instances of individuals inappropriately using controlled substances with a valid prescription. The Department acknowledges <u>the need for additional SUD provider capacity in the state of Wisconsin.</u> However, s. 49.79 (9) (d) (1), Wis. Stats., requires the Department to promulgate rules to develop and implement a drug screening, testing, and treatment policy. Furthermore, treatment providers maintain the ability to prioritize waitlists in a manner of their choosing. They are able to prioritize voluntary participants.

	and motivation are often more predictive of better treatment outcomes than mandatory or coerced treatment. Commenters ask that DHS consider putting the money that would be spent on this administrative rule towards substance use treatment providers as Wisconsin is experiencing a shortage in substance use disorder treatment providers. Expediency in receiving treatment when an individual is ready and willing to participate in drug treatment is extremely vital to success. This proposed rule will add to the treatment waiting list and exacerbate the prevalence of substance abuse in Wisconsin. Commenters argue that FoodShare recipients are already "work-ready". They provided statistics such as: "Among households with at least one working-age, non-disabled adult, more than half work while receiving FoodShare-and more than 80 percent work in the year prior to or the year after receiving FoodShare." and "58% of households receiving benefits start to work within the month that they start to receive benefits." Furthermore, many employers require drug testing, therefore, the proposed rule is redundant and unnecessary.	The Department also acknowledges that many FoodShare recipients are already "work-ready". The rule is intended to assist those individuals who are not "work-ready" to take the steps to be able to be fully able to engage in the workforce. This is also a savings to employers by being confident that individuals coming through the FSET program will be drug-free. The Department has updated the rule to incorporate the aspect of trauma-informed approaches as a requirement for the execution of the rule.
General	DHS received approximately 16 comments in support of the proposed rules for drug testing able-bodied adults who will receive FoodShare benefits paid for by tax dollars. Some individuals would like to see this policy expanded to drug test all individuals receiving any form of government assistance. Commenters state that enforcing drug testing will reduce abuse/fraud of state funded programs and promote self-reliance.	The proposed rule complies with requirements established in s. 47.79 (9) (d), Wis.Stats.. Further expansion of drug testing may be contemplated by the Legislature through the legislative process.
General	DHS received approximately 100 comments that were generally opposed to drug testing FoodShare recipients seeking FSET services. Some commenters argue that the proposed rule stigmatizes and discriminates against FoodShare applicants. They argue that mental health advocates have worked for years to address addiction as a chronic disease in need of lifelong management and destigmatize it. Individuals suffering from this disease require support and should not have their FoodShare taken away due to not being able to meet the work requirement through FSET. Commenters state that the proposed rules further complicate an already complicated application process and will turn eligible individuals away from applying from FoodShare, increasing hunger in Wisconsin. Others argue that if FSET participants must be drug tested then so should every government	The Department will be screening all FoodShare applicants who need to meet the ABAWD work requirement. It is important to note that this rule does not establish a FoodShare eligibility requirement as an individual would be eligible for FoodShare benefits regardless of the results of screening and/or testing, and if seeking treatment would be exempt from work requirements during that treatment period. The proposed rule only impacts able-bodied adults as defined in s.49.79 (1) (am), Stats. The Department did not modify the proposed rule based on these comments.

	official and anyone else receiving tax dollars in any other form. Advocates for older adults argue that the rule puts additional barriers to FoodShare and consequences of hunger and poor nutritional intake have long-lasting effects. Poor nutrition of younger adults impacts the health outcomes of adults as they age.	
General	Some commenters state that the rule will have a negative effect on the children and the elderly, blind, and disabled.	The proposed rule only impacts able-bodied adults as defined in s.49.79 (1) (am), Stats.
General	DHS received approximately 30 comments relating to the legality and constitutionality of the proposed rules. Commenters state that the proposed rule violates the Fourth Amendment of the Constitution andWisconsin should not require drug testing of FoodShare recipients wishing to participate in FSET absent probable cause. Commenters argue that drug screening and testing FoodShare recipients is a violation of Federal law. States are not allowed to impose additional application requirements as a condition of FoodShare eligibility. DHS defines individuals impacted by this policy as those who “intend on meeting the work requirements through participation in the food stamp employment and training program.” Non-exempt ABAWDs must comply with work requirements to remain eligible for FoodShare. Mandating drug testing as a condition of FSET is tantamount to requiring drug testing as a condition of FoodShare eligibility. Top administration officials of the Food and Nutrition Service within the USDA state that "The law clearly does not allow it." It will require an act of Congress for DHS to drug test FoodShare recipients wishing to participate in FSET to meet the ABAWD work requirement. Commenters point out that DHS cites 21 USC §862b as federal authorization for drug testing FoodShare recipients in Wisconsin. Commenters argue, however, that this interpretation is not accurate. DHS wrongly interprets 21 USC §862b2 to allow Wisconsin to define FoodShare as welfare, but the Personal Responsibility and Work Reconciliation Act of 1996 (PRWRA) did not include a definition of "welfare" in this section. PRWRA also defined "federal public benefits" in §401 noting welfare and food assistance separately. Furthermore, the USDA has interpreted this section to not include SNAP/FoodShare recipients. Other commenters pointed out that the statement of scope states that a drug screening assessment will be used to determine who is required to	The proposed rule gives individuals a choice of whether or not to submit to drug testing if their screening results indicate reasonable suspicion of drug use. At all points throughout the process individuals will have the choice of consent. Individuals who choose not to submit to drug testing will not be eligible to participate in the FSET program and will need to meet the ABAWD work requirement in another way, including volunteer service, work, or participation in another qualifying employment and training program such as Workforce Innovation and Opportunity Act (WIOA) programs. The choice to not submit to the drug test will not make them ineligible for FoodShare and there will remain other avenues by which individuals can meet the work requirement. The Department intends to use an evidence-based drug screening tool. Only individuals identified through the screening as having a possible substance use issue will be subjected to drug testing.

	submit to a drug test, but the proposal provides no information regarding what information the screening will seek or how it will be administered. In the absence of a clear explanation, the process may violate substance abuse and confidentiality rules in 42 CFR Part 2 established by SAMHSA. Additionally, commenters mention that the proposed rules may conflict with the American's with Disabilities Act (ADA) because it could deny health services on the basis of current drug use to people who are otherwise eligible, and protected under the ADA. Further the ADA requires that public entities, including states, provide equal access to services without regard to an individual's disability, provided that they meet eligibility requirements.	
General	DHS received approximately 60 comments relating to the inefficiency of the proposed rules. Commenters argue that drug testing FoodShare recipients is a wasteful and inefficient use of taxpayer dollars. State mandated drug testing of low income individuals seeking assistance is administratively burdensome, often results in lengthy litigation, and fails to produce positive test results. Commenters look to other states who have tested low income residents seeking state or federal assistance. No state has seen a high percentage of individuals test positive. Drug testing has been costly to other states without producing results that show significant drug use or abuse among applicants and recipients. For example, Missouri spent $493,000 on drug testing in 2013. 20 tests were positive out of 32,511 applications (0.06% identification rate, $24,650 in state tax dollars per positive test). Utah prescreened 4,730 applicants and based upon screening results, ordered drug testing for 466 people. Utah spent $25,000 to identify 12 failed tests out of those 466 prescreened applications (2.6% identification rate, $2,083 per positive test). Oklahoma spent $82,700 to identify 83 failed tests out of 1,890 applicants (4.3% identification rate, $996.38 per positive test). DHS estimates that of the 66,200 ABAWD's who would be screened each year, only 220 would fail the drug-test. Yet, DHS estimates a treatment cost of $853,700 annually, with $356,200 falling on county human services agencies. Local agencies would need to shoulder an additional $99,700 annually for drug testing. This cost estimate does not include staff and IT costs, which will add a significant amount to the already high cost.	The Department intends to use an evidence-based drug screening tool. Treatment costs will be covered. The intent is to ensure that taxpayer dollars that are being used to support the FSET program are being used most effectively and ensure that those individuals who are participating in the program are truly work-ready and able to fully engage in the workforce. The rule also presents an opportunity to reduce the economic costs of drug abuse across Wisconsin. This administrative rule alone will not address the full impact of the costs of drug abuse to Wisconsin residents, but does attempt allow an avenue for identifying individuals who need/want assistance and providing a means for those individuals to engage in treatment.

General	DHS received approximately 5 comments relating to concerns for individuals who are legally prescribed controlled substances. Commenters express concern that individuals who are legally prescribed pain medication will need to provide proof of their medical condition and history. Commenters are concerned that the proposed rule will deny treatment to individuals who take legally prescribed medication and drugs. DHS fails to state how administering agencies will determine possible use of a controlled substance without a valid prescription. For example, if an applicant had a prescription for pain medication from several months prior and continues to take pain medication sporadically as needed, would this be considered a valid prescription, even though the prescription is several months old?	A valid prescription, as defined in DHS 38.02 (11), will only be required for positive drug tests. DHS intends to adhere to all applicable HIPPA laws and minimize the necessary disclosure of protected patient information.
General	DHS received many comments from 14 counties, four IM agencies, and two county associations relating to the implementation of the proposed rules. As written, the rule defines “administering agency” as the State of Wisconsin, single county consortia, multi-county consortia, or tribal governing body. This broad definition of “administering agency” lends itself to confusion as to who is doing what with respect to the responsibilities outlined in the proposed rule. The definition implies that consortia and county agencies will be required to assume the additional workload and cost of drug screening, testing, and treatment of able-bodied adults in the State’s FoodShare program. Commenters request that the next version of the proposed rule specifically assign responsibility to specific entities for these aspects of the rule that align with DHS’s verbal intent. Furthermore, even if counties/IM agencies are not directly responsible for administering the drug screening or making referrals for testing, their customers will ask questions relating to the testing and treatment. IM agency operations will be significantly impacted by the additional time spent answering the influx of questions relating to drug testing and treatment. Additionally, the proposed rules make the “administering agency” staff responsible for detailing specific county enrollment processes particular to local treatment providers as part of the referral process. Neither IM nor FSET case management staff has the expertise to provide sufficient and thorough information about treatment options. Economic support (ES) workers are not trained to administer or evaluate a controlled substance abuse screening questionnaire to determine possible substance abuse or to deal with the potential disclosure customers may give during the screening	DHS acknowledges some of the concerns as raised. Several of these details are intended to be worked out through collaborative policy development during implementation of the rule. In response to concerns about the intent of funding, the Department has updated language in the rule to clarify that the Department will be responsible for screening, testing and treatment requirements costs of the rule.

	process. (ES workers are not AODA certified). Commenters are concerned about their ability to keep-up with the demand for treatment and about their ability to bill the state for services under the rule. Currently, FoodShare members who have a pending exemption from the ABAWD work requirement receive a referral to the FSET program as a non-exempt ABAWD. The proposed rules are unclear as to whether people with a pending exemption from FSET will also be subject to drug screening and testing as they undergo the exemption review process. It should be made clear that people are not subject to drug screening and testing while their exemption for a disability is under review. In general, the counties oppose a likely increase in cost, workload, and responsibility, with no additional funding or resources allocated with the proposed changes. They additionally request further details relating to the implementation of the proposed changes. Counties maintain that there has been lack of communication between DHS and counties on this proposed rule, alleging that DHS did not seek input from counties on the development of the rule and did not expressly inform Wisconsin County Human Service Association (WCHSA) or Wisconsin Counties Association (WCA) of the rule's development, even though county IM consortia and state staff have monthly IMAC meetings. Counties would have preferred to talk through this rule with DHS staff as the rule was in its developmental stage as opposed to discussing the rule through the public hearing process.	
DHS 38.04 (1)	In describing the information collected on the questionnaire, the proposed rule states that "related criminal background" will be collected. A person's criminal background is irrelevant to their need for employment or FoodShare benefits. In fact, a person who has successfully satisfied assigned penalties should be provided opportunities to become a contributing member of the community. Programs that discriminate based on a person's criminal history decrease that person's ability to succeed and increases recidivism rates. A person's past criminal history should not be a consideration during the application process for FoodShare or employment and training programs.	For some individuals past criminal history is already included as part of the application process for FoodShare. Per 7 CFR 273.11(m) Wisconsin is required to ask individuals if they have a drug felony in the past 5 years or if they are fleeing felons. Fleeing felons are not eligible for FoodShare while individuals with a drug felony in the past 5 years are required to take a drug test before they can be found eligible. Given current drug felon policy the proposed rule grants DHS the flexibility to streamline the application process for individuals who may be subject to both sets of policies.
DHS 38.04 (1)	The statement, "An administering agency shall determine whether answers to the controlled substance abuse-screening questionnaire indicate possible use of a controlled substance without a valid prescription by the individual" is vague and subjective. Determining factors should	DHS intends to use an evidence-based drug screening tool. Only individuals identified through the screening as having a possible substance use issue will be subjected to drug testing.

	be defined in the proposed rule for transparency and offered for public comment prior to rule adoption.	
DHS 38.04 (2) (a)	The requirement to present a valid prescription for a controlled substance should be clearly indicated alongside any question about an applicant's use of a prescribed controlled substance.	DHS intends to use an evidence-based drug screening tool. Only individuals identified through the screening as having a possible substance use issue will be subjected to drug testing.
DHS 38.04 (3)	An applicant should have the ability to request assistance in completing a questionnaire should they require assistance. An applicant should not be denied eligibility for participation in the employment and training program without first being offered assistance in completing the questionnaire.	DHS will follow State and Federal laws ensuring individuals access to needed accommodations. Individuals may also delegate appropriate authority to individuals to assist them throughout the application process is such assistance is needed. .
DHS 38.05 (1)	The sentence, "An individual whose answers on the screening questionnaire indicate possible use of a controlled substance without a prescription order shall be required to undergo a test for the use of a controlled substance" is vague and subjective. Determining factors should be defined in the proposed rule for transparency and offered for public comment prior to rule adoption.	DHS intends to use an evidence-based drug screening tool. Only individuals identified through the screening as having a possible substance use issue will be subjected to drug testing.
DHS 38.05 (4) (a)	The term "good cause" is vague and subjective. This term should be defined for transparency and offered for public comment prior to rule adoption.	"Good cause" is a term used frequently by FoodShare eligibility workers and FSET case managers. It is defined as events outside the control of the individual that prevent them from meeting certain requirements.
DHS 38.05 (4) (d)	The requirement of "verification of identity" is vague and subjective. This term should be defined for transparency and offered for public comment prior to rule adoption.	Verification of identity is defined in section 1.2.3.1 of the Wisconsin FoodShare handbook and would be similar for the purposes of this rule.
DHS 38.05 (6)	If an individual tests positive for the use of a controlled substance, a second test using a new specimen should be conducted by a vendor who is not the vendor who administered the first test. As indicated by the National Institutes of Health, "False-positive screens are the result of cross-reactivity to the antibody in Enzyme-mediated Immunoassays (ESA) tests due to specific medications or direct binding to the antibody due to inadvertent ingestion of opiates (eg, poppy seeds) or use of medications (eg, quinolones, rifampin, verapamil, quetiapine, and diphenhydramine), as well as by interference caused by lactate dehydrogenase and lactate." Tests for controlled substance use are not 100% accurate and should not be relied upon for program eligibility. However, if a test is used to determine drug use, a second test, using a new sample and new testing vendor, can reduce the likelihood of an applicant inappropriately being deemed ineligible for controlled substance use without a prescription.	As specified in 38.02 (12) DHS will contract with a "qualified drug testing vendor" to conduct the drug tests which will be a CLIA certified vendor. The Department will follow standard drug testing protocols to ensure accuracy of results.
DHS 38.06	An applicant should be provided FoodShare benefits during referral to a drug treatment facility and after completing the program. Drug addiction	Per DHS 38.06 (4), individuals on a waiting list for treatment services are eligible to participate in FSET. This rule does not make FoodShare

	is a recognized disease of the brain and body. Withholding nutrition from an applicant while they are waiting for medical treatment for a suspected disease is neither humane nor productive.	eligibility contingent on drug test results or treatment progress. Individuals can meet the work requirement in ways other than FSET participation, if they choose.
DHS 38.06 (3) (c)	The number and location of drug treatment facilities are inadequate to serve the population of people in need of medical intervention. Couleecap, Inc. frequently serves individuals with substance abuse disorders who are unable to get treatment due to a lack of access to facilities that treat such disorders. This is especially true in the rural communities. Before requiring drug testing and treatment of FoodShare applicants, the State of Wisconsin should first analyze the availability of services statewide and work to develop a system of care in areas that are currently underserved.	DHS continues to work on addressing the drug treatment provider shortage in Wisconsin. Individuals subject to the requirements within this rule will not lose their FoodShare benefits while they wait for treatment services.
DHS 38.06 (4) (b)	Under the proposed rule, an individual waitlisted for drug treatment service is required to “take all necessary steps” to seek enrollment into other treatment programs. This places undue burden on the applicant. It should be DHS’s responsibility to identify alternative placement for the individual into a drug treatment program within a reasonable distance from their place of residency should they be waitlisted at the preferred facility. This burden should not be placed on the applicant.	The Department will address this in implementation of the administrative rule.
DHS 38.09	Applicants should be provided with FoodShare benefits during an appeal process and until all proceedings of that appeal have been concluded.	FoodShare policy allows individuals to request a fair hearing when benefits are denied, reduced, or ended and they believe the agency made a mistake. The policy allows individuals to continue receiving benefits until the hearing officer makes a decision. Nothing in this rule would change that current process or policy.
DHS 38.10 (2)	The administering agency should also be responsible for costs associated with finding a secondary treatment facility should the applicant be waitlisted at the preferred treatment facility.	DHS 38.10(3) requires DHS to pay for treatment costs. Nothing in this section limits payment to only the preferred or secondary treatment facility.