

The Governor approved this Statement of Scope on October 07, 2016

**STATEMENT OF SCOPE**  
**DEPARTMENT OF HEALTH SERVICES**

**Rule No.:** DHS 105.17

**Relating to:** Provider Certification, Personal Care Providers

**Rule Type:** Permanent

**Type of Statement of Scope:** Original

**1. Detailed description of the objective of the proposed rule:**

The 2009 - 2011 biennial budget bill expanded the types of entities that could be certified by the Department of Health Services as Medicaid personal care providers to include free-standing personal care agencies (PCAs), in addition to counties, federally recognized American Indian tribes and bands, home health agencies, and independent living centers. Section DHS 105.17 was revised July 2010 in response to the addition of free-standing PCAs. Since 2010, the department has certified 251 free-standing PCAs with an additional 16 free-standing PCAs in the process of being certified.

The department has determined that existing standards contained in s. DHS 105.17 are not adequate to monitor compliance with Medicaid requirements and to prevent fraud, waste, and abuse by PCAs in the Medicaid program. In addition, the department has determined that provisions relating to the health, safety, and rights of clients receiving services from PCAs or subcontractors could be strengthened. This determination is also confirmed by the federal Office of Inspector General, that found significant and persistent compliance, payment, and fraud vulnerabilities by PCAs in its report titled: Personal Care Services, Trends, Vulnerabilities, and Recommendations for Improvement (November 2012). The department therefore intends to revise s. DHS 105.17 and propose changes relating to governing bodies, staff training and qualifications, minimum age requirements, supervision of personal care workers, quality improvement, facility closure and provider certification.

**2a. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

Pursuant to s. 49.45 (2) (a) 11., Stats., the department proposes to amend s. DHS 105.17 as follows:

On-site survey prior to certification

Currently, the department recommends a PCA for provisional certification based on a review of the PCA's application packet and without conducting an onsite survey of the PCA. An onsite survey is not required and may not be conducted by the department for several months after provisional certification is granted, at which time significant problems may be identified. The department proposes to revise the certification standards of s. DHS 105.17 to require an on-site survey and a finding of substantial compliance with the regulations before provisional certification may be granted to the PCA.

Governing body

Currently, there is no requirement for a PCA to have a governing body to oversee its operations. The department intends to establish standards that would require a PCA to have a governing body to provide oversight, develop governing policies, appoint an administrator and substitute administrator, and develop a statement of the services to be provided by the PCA.

#### Administrator and administrator qualifications

Currently, there is no requirement for a PCA to appoint an administrator and substitute administrator responsible for supervising daily operations. The department intends to establish standards requiring the appointment of a qualified administrator and substitute administrator responsible for ensuring that staff is knowledgeable and compliant with requirements governing PCAs. Existing administrators will not be subject to newly proposed qualification requirements.

#### Quality improvement program

Currently, a PCA is not required to have a quality improvement program to evaluate the effectiveness of its program and services. The department intends to establish standards that would require PCAs to have an ongoing quality improvement committee. The committee would be responsible for evaluating client services, identifying areas of improvement, and documenting and implementing plans to correct problems.

#### Staff training

Currently, PCAs are not required to provide orientation and ongoing training to staff working directly with clients in various areas of mandated care. The department intends to revise s. DHS 105.17 to strengthen orientation and ongoing training standards in order to improve the quality of services provided by personal care workers and staff.

#### Minimum age and skills set for personal care workers

Currently, no minimum age or skill set requirements are specified in s. DHS 105.17 for personal care workers providing services to vulnerable clients in their homes. The department intends to revise s. DHS 105.17 to establish minimum age and qualification requirements for personal care workers to ensure that vulnerable clients receive adequate care.

#### Supervision of the personal care worker

Section DHS 105.17 requires that a registered nurse conduct a supervisory visit in the client's home every 60 days to evaluate whether staff is providing care in compliance with regulatory requirements. The registered nurse must evaluate the client's condition, evaluate the services provided to the client by the personal care worker, review service records and the plan of care and, when needed, discuss with the physician any necessary changes to the plan of care. The department proposes to clarify the existing requirement that supervisory visits be conducted at a time when the personal care worker may be directly observed providing services to clients in the client's home.

#### Agency closure

Currently, PCAs are not required to notify a client or the client's representative when the PCA is closing, or to provide assistance to the client in arranging for continuity of necessary services. The department therefore intends to revise s. DHS 105.17 to ensure clients or their representatives are provided sufficient notice and assistance in obtaining alternative personal care services in the event of a PCA closure.

## **2b. Analysis of policy alternatives**

The department could choose not to revise s. DHS 105.17. However, this alternative is not reasonable because the department has determined that oversight of PCAs is inadequate to ensure a minimum standard of care for vulnerable clients, and to prevent fraud, waste, and abuse by PCAs in the Medicaid program. This determination is also confirmed by the federal Office of Inspector General, that found significant and persistent compliance, payment, and fraud vulnerabilities by PCAs in its report titled:

*Personal Care Services, Trends, Vulnerabilities, and Recommendations for Improvement* (November 2012).

The department could choose to propose voluntary guidelines for PCAs, rather than establishing standards by rule. However, this alternative is not reasonable because voluntary compliance with such guidelines would prevent the department from ensuring consistency in the standard of care provided to vulnerable clients. In addition, voluntary compliance with such guidelines would impede the department's efforts to reduce fraud, waste, and abuse in the Medicaid program.

### **3. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

The department's authority to promulgate rules is as follows:

Section 49.45 (2) (a) 11., Stats., states that the department shall:

Establish criteria for certification of providers of medical assistance and, except as provided in par. (b) 6m. and s. 49.48, and subject to par. (b) 7. and 8., certify providers who meet the criteria.

Section 49.45 (10), Stats., states, in relevant part:

**RULE-MAKING POWERS AND DUTIES.** The department is authorized to promulgate such rules as are consistent with its duties in administering medical assistance.

Section 227.11 (2) (a), Stats., states:

Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

### **4. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:**

The department will spend approximately 2,000 staff hours for rulemaking. The department may form an advisory committee to assist in developing the rule.

### **5. List with description of all entities that may be affected by the proposed rule:**

The entities that may be affected by the proposed rule are PCAs, PCA staff and employees, PCA governing bodies, clients of PCAs, and client representatives.

**6. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:**

There appear to be no existing or proposed federal regulations that address the activities to be regulated by the proposed rule.

**7. Anticipated economic impact of implementing the rule:**

The proposed rule is anticipated to have little to no economic impact if promulgated. The proposed rule will have an impact on small businesses.

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