

# **09hr\_JCR-AR\_Misc\_pt14**



Details: Emergency Rule extension requests by Department of Health Services.  
(FORM UPDATED: 08/11/2010)

## **WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS**

### **2009-10**

(session year)

### **Joint**

(Assembly, Senate or Joint)

### **Committee for Review of Administrative Rules ...**

#### **COMMITTEE NOTICES ...**

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
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#### **INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL**

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  - (**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)
  - (**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

\* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)



State of Wisconsin  
Department of Health Services

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Jim Doyle, Governor  
Karen E. Timberlake, Secretary

December 22, 2008

The Honorable Robert Jauch  
Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 118 South, State Capitol  
Madison, Wisconsin 53702

The Honorable Daniel LeMahieu  
Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 17 North, State Capitol  
Madison, Wisconsin 53702

Dear Senator Jauch and Representative LeMahieu:

The Department issued an emergency order creating ch. DHS 119, to promulgate rules required under s. 256.15 (9m), Stats., as created by 2007 Act 104, to require emergency medical technicians, first responders, and their instructors to complete training on the use of automated external defibrillators, and to specify the content of the training, qualifications of providers, and frequency in which training is to be completed. 2007 Act 104 exempts the Department from making a finding of emergency to adopt these emergency rules.

The emergency order became effective on September 1, 2008, and will expire on January 29, 2009.

This letter is to request the Joint Committee for Review of Administrative Rules to extend the effective period of the emergency order by 60 days, to March 31, 2009, because the Department has determined that it will not be possible to promulgate the permanent rules before the emergency rules expire on January 29, 2009. Pursuant to instruction from the Legislative Council, agencies must hold rules in the agency until the next regular session if the rules are not submitted to the Presiding Officers on or before September 1 of an even-numbered year.

Page 2  
December 22, 2008

A copy of the emergency order is attached to this letter. If you have questions about the rules or the fiscal estimate, please contact Rosie Greer at 608-266-1279.

Sincerely,

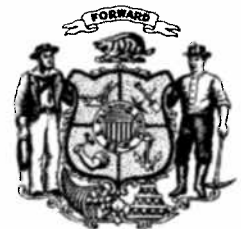
Karen E. Timberlake  
Secretary

Attachments

cc: Senator Fred Risser  
Speaker Michael Huebsch



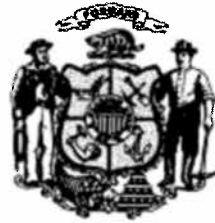
# WISCONSIN STATE LEGISLATURE



SENATOR JIM HOLPERIN  
CO-CHAIR

PO Box 7882  
MADISON, WI 53707-7882

(608) 266-2509



REPRESENTATIVE JOSH ZEPNICK  
CO-CHAIR

PO BOX 8953  
MADISON, WI 53707-8953

(608) 266-1707

January 6, 2009

Karen Timberlake, Secretary  
Wisconsin Department of Human Services  
P.O. Box 7850  
Madison, WI 53707

Dear Secretary Timberlake:

Re: DHS 119 AED Training – Request for Rule Extension

The Joint Committee for the Review of Administrative Rules met in Executive Session on January 6, 2009 and adopted the following motion:

Moved by Representative Hebl, seconded by Senator Lehman to combine the three rule extension requests and vote on them en masse, with the outcome applied to each of the respective requests, be granted a 60-day emergency rule extension from the date of the proceedings of this committee.

Motion Passed 10-0.

Pursuant to s. 227.24(2)(c), stats., we are notifying the Legislative Reference Bureau of the Committee's action through copies of this letter.

Sincerely,

A handwritten signature in black ink that reads "Jim Holperin".

Senator Jim Holperin  
Senate Co-Chair

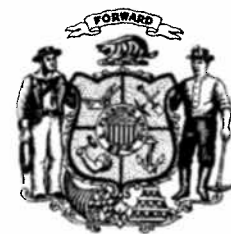
A handwritten signature in black ink that reads "Josh Zepnick".

Representative Josh Zepnick  
Assembly Co-Chair

cc: Bruce Hoesly, Legislative Reference Bureau  
Ron Sklansky, Legislative Council



WISCONSIN STATE LEGISLATURE





State of Wisconsin  
Department of Health Services

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Jim Doyle, Governor  
Karen E. Timberlake, Secretary

February 25, 2009

The Honorable Jim Holperin, Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 409 South, State Capitol  
Madison, Wisconsin 53707

The Honorable Josh Zepnick, Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 219 North, State Capitol  
Madison, Wisconsin 53708

Dear Senator Holperin and Representative Zepnick:

The Department issued an emergency order modifying ch. DHS 12, to promulgate rules to specify crimes for which an entity must disclose a conviction, to a client or the client's guardian, of a caregiver who is assigned to provide personal care services to a client in the client's personal residence and to specify who is a "substitute caregiver". The rulemaking is required by the Legislature, under s. 50.065 (2m) (d), Stats., as created by 2007 Act 172. The emergency order became effective on November 1, 2008, and will expire on ~~March 31, 2009.~~

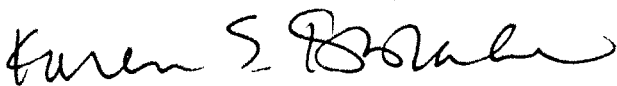
This letter is to request that the Joint Committee for Review of Administrative Rules extend the effective period of the emergency order by 60 days, to May 30, 2009, because the Department has determined that it will not be possible to promulgate the permanent rules before the emergency rules expire on March 31, 2009. The Department will file its final proposed permanent rules and legislative report with the Presiding Officers on February 27, 2009, and it will be at least another 90 days before the statutory requirements of the rulemaking process are completed.

The proposed rules meet the requirements of s. 50.065 (2m) (d), Stats., by including a definition of the term "substitute caregiver" and a list of crimes that require disclosure for caregivers providing personal care services. This list includes all of the crimes currently listed under s. 50.065 (1) (e), Stats., which entities already use, including entities serving persons under the age of 18, to determine an individual's eligibility to work for the entity as a caregiver, and includes the following additional crimes:

- Theft
- Robbery
- Financial card transaction crimes
- Identity theft
- Drug crimes

A copy of the emergency order is attached to this letter. If you have questions about the rules, please contact Rosie Greer at 608-266-1279.

Sincerely,



Karen E. Timberlake  
Secretary

Attachments

cc Senator Fred Risser  
Speaker Michael Sheridan



**PROPOSED ORDER OF  
DEPARTMENT OF HEALTH SERVICES  
TO ADOPT RULES**

The Wisconsin Department of Health Services proposes to repeal DHS 12.03 (15) and to create DHS 12.03 (20m), 12.115 and Table DHS 12.115, relating to background checks of individuals who provide personal care services, and affecting small businesses.

**SUMMARY OF PROPOSED RULE**

**Statute interpreted:**

Section 50.065 (2m) (a) 1. and 4. and (b), Stats.

**Statutory authority:**

Section 50.065 (2m) (d), Stats., as created by 2007 Wisconsin Act 172, and 227.11 (2) (a), Stats.

**Explanation of agency authority:**

Section 50.065 (2m) (d), Stats., requires the Department to promulgate rules to specify crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services to a client in the client's personal residence and to specify who is a "substitute caregiver".

Section 227.11 (2) (a), Stats., allows agencies to promulgate rules interpreting the provision of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

**Related statute or rule:**

Chapter DHS 13.

**Plain language analysis:**

Section 50.065 (2m) (d), Stats., requires the Department to promulgate rules to specify crimes for which an entity must disclose to a client or the client's guardian, a conviction of a caregiver who is assigned to provide personal care services to the client in the client's personal residence and to specify who is a "substitute caregiver". These requirements were established under 2007 Act 172.

The proposed rule includes a definition of the term "substitute caregiver." The proposed rule also includes a list of crimes that require disclosure for caregivers providing personal care services. This list includes all of the crimes currently listed under s. 50.065 (1) (e), Stats., which entities already use, including entities serving persons under the age of 18, to determine an individual's eligibility to work for the entity as a caregiver, and includes the following additional crimes:

- Theft
- Robbery
- Financial card transaction crimes
- Identity theft
- Drug crimes

A substantially similar emergency rule has been in effect beginning November 1, 2008.

**Summary of, and comparison with, existing or proposed federal regulations:**

No known existing or proposed related federal regulations exist.

**Comparison with rules in adjacent states:**

**Illinois:**

Illinois has no list of crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services.

**Iowa:**

Iowa has no list of crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services.

**Michigan:**

Michigan has no list of crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services.

**Minnesota:**

Minnesota has no list of crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services.

**Summary of factual data and analytical methodologies:**

The Department solicited comments from representatives of the Disability Rights Wisconsin, Inc., the Board on Aging and Long Term Care (BOALTC), the Wisconsin Coalition of Aging Groups (CWAG), Independence First, Association of Retarded Citizens, Wisconsin Personal Services Association (WPSA), Community Alliance of Providers of Wisconsin (CAPOW), representatives from the Home Care Advisory Committee (HCAC) and the Home Care Consumer Advisory Committee (HCCAC), and Wisconsin legislators. Representatives from these organizations reviewed the initial draft of the rule, including a list of crimes and a definition of "substitute caregiver". The Department revised the rule based upon comments received.

**Analysis and supporting documents used to determine effect on small business:**

The small businesses affected by the proposed rule are temporary employment agencies and home health agencies, and any other agency that may assign individuals to provide personal care services to clients in the clients' private residence. The proposed rule would not have a fiscal impact on small businesses over and above the costs imposed by the requirements established by Act 172 under s. 50.065 (2m), Stats., for entities to conduct background checks, including criminal history checks, on individuals the entity assigns to provide personal care services in a client's private residence and disclose the results to the client or the client's guardian.

**Effect on small business:**

The proposed rule would not have a fiscal impact on small businesses over and above the costs imposed by the requirements established by Act 172 under s. 50.065 (2m), Stats., for entities to conduct background checks, including criminal history checks, on individuals the entity assigns to provide personal care services in a client's private residence and disclose the results to the client or the client's guardian.

**Agency contact person:**

Pat Benesh, Quality Assurance Program Spec-Senior

DHS Division of Quality Assurance  
 1 West Wilson St. Rm. 1150  
 Madison, WI 53701  
 Phone: 608-264-9896  
 Fax: 608-267-7119  
 Patricia.Benesh@Wisconsin.gov

**Place where comments are to be submitted and deadline for submission:**

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin Administrative Rules Website at <http://adminrules.wisconsin.gov> after the hearing is scheduled.

TEXT OF PROPOSED RULE

SECTION 1. DHS 12.03 (15) is repealed and recreated to read:

DHS 12.03 (15) "Personal care services" has the meaning given in s. 50.065 (1) (cr), Stats.

SECTION 2. DHS 12.03 (20m) is created to read:

DHS 12.03 (20m) "Substitute caregiver" means, with respect to a client who is receiving personal care services in the client's residence, an individual who provides personal care services to the client for 7 or fewer days in a 90-day period.

SECTION 3. DHS 12.115 is created to read:

**DHS 12.115 Personal care services, disclosure of convictions.** Pursuant to s. 50.065 (2m) (d) Stats., Table DHS 12.115 lists the crimes for which an entity must disclose to a client or the client's guardian under s. 50.065 (2m) (a) 1., Stats., a conviction of a caregiver, other than a substitute caregiver, who provides personal care services to a client in the client's residence. For the purposes of s. 50.065 (2m) (a) 4. and (b), Stats., 'substitute caregiver' has the meaning given in s. DHS 12.03 (20m).

Table DHS 12.115

Wisconsin Statutes	Crime
940.19 (3), 1999 Stats.	Battery
940.01	First-degree intentional homicide
940.02	First-degree reckless homicide
940.03	Felony murder
940.05	Second-degree intentional homicide
940.12	Assisting suicide
940.19 (2), (4), (5) or (6)	Battery (felony)
940.22 (2) or (3)	Sexual exploitation by therapist; duty to report
940.225 (1), (2), or (3)	1 <sup>st</sup> , 2 <sup>nd</sup> , or 3 <sup>rd</sup> degree sexual assault

940.285 (2)	Abuse of individuals at risk
940.29	Abuse of residents of penal facilities
940.295	Abuse or neglect of patients and residents
943.20	Theft
943.201	Unauthorized use of an individual's personal identifying information or documents
943.203	Unauthorized use of an entity's identifying information or documents
943.32	Robbery
943.38	Forgery
943.41	Financial transaction card crimes
948.02 (1) or (2)	1 <sup>st</sup> or 2 <sup>nd</sup> degree sexual assault of a child
948.025	Engaging in repeated acts of sexual assault of the same child
948.03 (2) (a), (b) or (c)	Physical abuse of a child
948.05	Sexual exploitation of a child
948.051	Trafficking of a child
948.055	Causing a child to view or listen to sexual activity
948.06	Incest with a child
948.07	Child enticement
948.08	Soliciting a child for prostitution
948.085	Sexual assault of a child placed in substitute care
948.11 (2) (a) or (am)	Exposing a child to harmful material or harmful descriptions or narrations
948.12	Possession of child pornography
948.13	Child sex offender working with children
948.21(1)	Neglecting a child
948.30	Abduction of another's child; constructive custody
948.53	Child unattended in child care vehicle
961.41 (1)	Manufacture, distribution or delivery of a controlled substance or a controlled substance analog
961.41 (1m)	Possession with intent to manufacture, distribute or deliver a controlled substance or a controlled substance analog
961.41 (3g)	Possession or attempt to possess a controlled substance or a controlled substance analog  Only if the date of conviction is within 5 or fewer years from the date the results of the criminal background check are obtained by the entity.
961.43 (1) (a)	Acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge
961.43 (1) (b)	To make, distribute or possess material designed to reproduce the trademark upon any drug or container or label so as to make a counterfeit substance or to duplicate the physical appearance, form, package or label of a controlled substance

A violation of the law of any other state or United States jurisdiction that would be a violation of a crime listed in this table.

EFFECTIVE DATE: This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health Services

Dated:

\_\_\_\_\_  
Karen E. Timberlake, Department Secretary

SEAL:

**ADMINISTRATIVE RULES  
REPORT TO LEGISLATURE  
CLEARINGHOUSE RULE CR08-098**

**By the Department of Health Services relating to ch. DHS 12, Caregiver Background Checks**

**Basis and Purpose of Proposed Rule**

Section 50.065 (2m) (d), Stats., requires the Department to promulgate rules to specify crimes for which an entity must disclose to a client or the client's guardian, a conviction of a caregiver who is assigned to provide personal care services to the client in the client's personal residence and to specify who is a "substitute caregiver".

The proposed rule includes a definition of the term "substitute caregiver." The rule also includes a list of crimes that require disclosure related to caregivers providing personal care services, including all of the crimes currently listed under s. 50.065 (1) (e), Stats., already used by entities, to determine a person's eligibility to work for the entity as a caregiver, and the following additional crimes:

- Theft
- Robbery
- Financial card transactions crimes
- Identity theft
- Drug crimes

**Responses to Legislative Council Rules Clearinghouse Recommendations**

The Department accepted the comments made by the Legislative Council Rules Clearinghouse and modified the proposed rule where suggested.

**Final Regulatory Flexibility Analysis**

The proposed rule will not have a fiscal impact on small businesses, independent of the costs already imposed by the requirements under s. 50.065 (2m), Stats., that entities conduct background checks, including criminal history checks, on individuals the entity assigns to provide personal care services in a client's residence and disclose the results to the client or the client's guardian.

**Changes to the Analysis or Fiscal Estimate**

**Analysis**

The Department amended the analysis to clarify that the list of crimes that require disclosure include all of the crimes currently listed under s. 50.065 (1) (e), Stats., that are already used by entities, including entities serving persons under the age of 18, to determine an individual's eligibility to work for the entity as a caregiver, along with additional crimes.

**Fiscal Estimate**

No changes were made to the fiscal estimate.

### Public Hearing Summary

The Department began accepting public comment on the proposed rule on November 25, 2008 via the Wisconsin Administrative Rules Website. One public hearing was held in Madison on January 6, 2009. Six individuals attending the hearing. The hearing record closed on January 16, 2009.

### List of Public Hearing Attendees and Commenters

The following is a complete list of the persons who attended the public hearing or submitted comments on the proposed rule, the position taken by the commenter and whether or not the individual provided written or oral comments.

Name and Address	Position Taken (Support or Opposed)	Action (Oral or Written)
1. Burton A. Wagner 22 E. Mifflin St. Madison, WI 53703	Opposed	Oral and Written
2. Amy Mlot Society's Assets, Inc. 5200 Washington Ave. #225 Racine, WI 53406	Opposed	Oral
3. Laurie Hintz 336 W. Wabash Waukesha, WI 53186	None taken.	Observer
4. Ruth Ann Zwiefelhofer Society's Assets, Inc. 5200 Washington Ave. # 225 Racine, WI 53406	Opposed	Oral
5. John Hendrick Coalition of Wisconsin Aging Groups 2850 Dairy Drive, Suite 100 Madison, WI 53718	Support	Oral
6. Dan Hayes 16 N. Carroll St, Suite 800 Madison, WI 53703	None taken.	Observer
7. Forbes McIntosh, Government Policy Solutions for: LuAnne Barnet, President Residential Services Association (RSA) of Wisconsin Bob Glowacki, President Community Alliance of Providers of Wisconsin (CAPOW)	Opposed	Written

### Public Comments and Department Responses

The number(s) following each comment corresponds to the number assigned to the individual listed in the Public Hearing Attendees and Commenters section of this document.

<b>Rule Provision</b>	<b>Public Comment</b>	<b>Department Response</b>
General	<p>There has been a significant financial impact on the agency to implement the new rule, approximately \$ 1,010,000 annually. The work involves a huge man power commitment while staff is still trying to recruit, hire and retain staff. 2, 4</p>	<p>The proposed rule does not have a fiscal impact on businesses independent of the costs imposed by the requirements established under s. 50.065 (2m), Stats., as created by 2007 Act 172, for entities to conduct background checks on individuals the entity assigns to provide personal care services in a client's residence and disclose the results to the client or the client's guardian. Additional costs individual entities may incur are directly related to the new statutory requirements.</p>
DHS 12.115	<p>Recommend the department limit notification of convictions that do not relate to physical harm or immediate jeopardy to an established time period from the date of conviction.</p> <p>Individuals who have committed less serious crimes should not be punished for the remainder of their lives. If a person has been convicted of a less serious crime and has not had another similar criminal conviction within 5 years, then notification should not be required.</p> <p>The Department should limit notification of less serious criminal convictions where an individual has established rehabilitation with the Department of Health Services. Individuals who have been convicted of less serious crimes should not be punished for the remainder of their lives, if that individual has met Department requirements establishing rehabilitation. If a person who has been convicted of a less serious crime; has not had another similar criminal conviction within 3 years; and has received DHS certification of being rehabilitated, then notification should not be required. The commenter identified theft, robbery, financial card transactions crimes, identity theft, leaving a child unattended in a child care vehicle, possession of a controlled substance, acquiring a controlled substance by misrepresentation or forgery or making, distributing or possessing material to reproduce any drug as less serious</p>	<p>The Department did not limit the disclosure requirement for crimes concerning theft, robbery, financial card transactions crimes and identity theft. Placing a person who has a conviction of one of these crimes into the client's home could place the client at risk for theft of their property. Lesser financial crimes, such as retail theft (shoplifting), are not included in the list of crimes to be disclosed.</p> <p>The Department amended DHS 12.115 to require disclosure of a conviction if the caregiver background check shows the person was convicted of an offense pursuant to s. Wisconsin Statute 961.41 (3g) (possession or attempt to possess a controlled substance) within 5 years before the information was obtained. The disclosure requirement for s. 961.41 (3g) is in effect for 5 years from the date of conviction.</p> <p>The Department did not include a time limit for disclosing the remaining drug related convictions or leaving a child unattended in a child care vehicle. The remaining drug offenses include the manufacture, distribution or delivery of a controlled substance, acquiring a controlled substance by misrepresentation or forgery or making, distributing or possessing material to reproduce any drug. Placing an individual with a conviction of any of these offenses in</p>



Rule Provision	Public Comment	Department Response
	crimes. 7	<p>a client's home could place the client at risk for loss of their prescription medication and personal property or place minors at risk for neglect.</p> <p>It is important to emphasize that conviction of a crime relating to theft, robbery, financial card transactions, identity theft or a drug related crime requires the entity to disclose the conviction to the client but does not bar the individual from employment except for certain persons providing foster care except for certain persons providing foster care.</p>
DHS 12.115	<p>The Coalition of Wisconsin Aging Groups supports the disclosure of financial crimes. Recent studies estimate that approximately 3.5 % of Wisconsin's elderly are victims of financial exploitation. Financial exploitation is a large and growing crime. The conviction of any financial crime should be reported. The perpetrators are family and non-family members. People in their homes are more vulnerable. Although CWAG's primary concern is not with drug crimes, often financial crimes are motivated by drug use. Drug use 10 years ago may not be as relevant. It should be remembered that the proposed list of convictions does not bar employment but only requires that the entity disclose the conviction. 6</p>	No response necessary.
DHS 12.115	<p>Commenters expressed concern that drug convictions are included in the list of convictions that must be disclosed. Currently conviction of these crimes bars employment only with children. Commenters state there is no reason that convictions of drug crimes should apply to adults. Many times these crimes were committed when the individual was young, 18 or 19 years old, and now, at age 50, the convictions must be disclosed. Commenters recommend a time limit for disclosure be placed on the conviction. 1, 2.</p>	<p>The Department amended DHS 12.115 to require disclosure of a conviction if the caregiver background checks show the person was convicted of s. Wisconsin Statute 961.41 (3g) (possession or attempt to possess a controlled substance) within 5 years before the information was obtained. The disclosure requirement for s. 961.41 (3g) is in effect for 5 years from the date of conviction.</p> <p>The Department did not include a time limit for disclosing convictions of the remaining drug related offenses listed under Table DHS 12.115. The remaining drug offenses include the manufacture, distribution or</p>

Rule Provision	Public Comment	Department Response
		<p>delivery of a controlled substance, acquiring a controlled substance by misrepresentation or forgery or making, distributing or possessing material to reproduce any drug. Placing an individual with a conviction of any of these offenses in a client's home could place the client at risk for loss of their prescription medication and personal property.</p> <p>It is important to emphasize that conviction of a crime relating to theft, robbery, financial card transactions, identity theft or a drug-related crime requires the entity to disclose the conviction to the client but does not bar the individual from employment except for certain persons providing foster care.</p>
DHS 12.115	<p>Recommend exempting multi-family dwellings from definition of "Residence". A prime directive in the care of individuals with developmental disabilities is to provide care in the least restrictive setting and to promote independence. Toward that end, many providers have worked with individuals and guardians toward multi-family rental agreements in independent apartment buildings with roommates. These dwellings are not Adult Family Homes, Community-Based Residential Facilities or Residential Care Apartment Complexes. These are independent dwellings with one or more roommates that are concentrated near similar dwellings so that service providers can be provided in an efficient and cost effective manner. Under this law one individual will have veto power over the continued employment or new employment of a personal care worker even if others approve. This would be unfair to the employee and unfair to the other individuals that may have built a strong relationship with the personal care worker. 7</p>	<p>The Department did not exempt from disclosure the convictions of caregivers providing personal care services to residents of multi-family dwellings. If the Department were to make an exemption, persons living in multi-family dwellings would be denied the protection of the law given to their counterparts living in single-family dwellings. The proposed rule requires that entities disclose to each client or to each client's guardian a conviction of a caregiver who is assigned to provide personal care services. The client or client's guardian would decide whether they would agree to receive services from the caregiver. One client would not make this decision for another client.</p> <p>The Department does not require entities that provide personal care services in facilities to provide background disclosure to persons admitted to the following regulated facilities:</p> <ul style="list-style-type: none"> <li>○ Nursing home [s. 50.01(3)]</li> <li>○ Community based residential facility [s. 50.01(1g)]</li> <li>○ Adult family home [s. 50.01(1)]</li> <li>○ Residential care apartment complex [s. 50.01(1d)]</li> </ul>





State of Wisconsin  
Department of Health Services

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Jim Doyle, Governor  
Karen E. Timberlake, Secretary

March 2, 2009

The Honorable Jim Holperin, Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 409 South, State Capitol  
Madison, Wisconsin 53707

The Honorable Josh Zepnick, Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 219 North, State Capitol  
Madison, Wisconsin 53708

Dear Senator Holperin and Representative Zepnick:

This letter is to request that the Joint Committee for Review of Administrative Rules extend the effective period of the Department's emergency order relating to s. DHS 10.23 (2), confidentiality requirements of the Family Care program, by 60 days, to June 2, 2009, because the Department has determined that it will not be possible to promulgate the permanent rules before the emergency ~~rules expire on April 2, 2009~~. The Department will file its final proposed permanent rules and legislative report with the Presiding Officers on or about March 9, 2009, and it will be at least another 90 days before the statutory requirements of the rulemaking process are completed.

The Department issued the emergency order revising s. DHS 10.23, to permit disability benefit specialists to report abuse, neglect, or financial exploitation of elder adults or adults-at-risk without violating the rule's non-disclosure provisions. The existing permanent rule s. DHS 10.23 (2) (d) 2., includes standards for confidentiality which prohibit disability benefit specialists from disclosing personally identifying information about a client without the client's consent unless required by law. Because disability benefit specialists are permissive reporters, and thus not required to report abuse, neglect, or financial exploitation of elder adults and adults at risk under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., s. DHS 10.23 (2) (d) 2., effectively prevents disability benefits specialists from making such disclosures.

The changes to s. DHS 10.23 (2) (d) 2., helps to ensure that elder adults and adults-at-risk who may have been abused, neglected, or financially exploited are brought to the attention of the abuse, neglect and exploitation response systems outlined under ss. 46.90 and 55.043, Stats. If the emergency order is allowed to expire, the potential abuse, neglect, or

financial exploitation of elder adults and adults-at-risk may go unreported and needed services not being provided. The Department's responsibilities for adult protective services are outlined under s. 55.02, Stats. Section 55.01 (6r), Stats., defines protective services to include identification of individuals in need of services to keep the individual safe from abuse, neglect or financial exploitation.

A copy of the emergency order is attached to this letter. If you have questions about the rules, please contact Rosie Greer at 608-266-1279.

Sincerely,



Karen E. Timberlake  
Secretary

Attachments

cc Senator Fred Risser  
Speaker Michael Sheridan

CERTIFICATE

STATE OF WISCONSIN )  
 )SS  
DEPARTMENT OF HEALTH AND SERVICES )

I, Karen E. Timberlake, Secretary of the Department of Health Services and custodian of the official records of the Department, do hereby certify that the annexed emergency administrative rules amending s. HFS 10.23 (2) (d) 2., relating to confidentiality requirements of the Family Care program that prohibit benefit specialists from disclosing personally identifying information about a client without the client's informed consent, unless required by law were duly approved and adopted by this Department on October 24, 2008.

I further certify that this copy has been compared by me with the original on file in the Department and that this copy is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 24<sup>th</sup> day of October, 2008.

SEAL:



Karen E. Timberlake, Secretary  
Department of Health and Services

**ADMINISTRATIVE RULES  
ORDER OF THE  
DEPARTMENT OF HEALTH SERVICES  
ADOPTING EMERGENCY RULES**

The Wisconsin Department of Health Services hereby adopts emergency rules to amend s. HFS 10.23 (2) (d) 2., relating to confidentiality requirements of the Family Care program that prohibit benefit specialists from disclosing personally identifying information about a client without the client's informed consent, unless required by law.

**FINDING OF EMERGENCY**

The Department of Health Services finds that an emergency exists and that adoption of an emergency rule is necessary for the immediate preservation of the public health, safety and welfare. The facts constituting the emergency are as follows:

Chapter HFS 10 is the department's rule that guides the implementation of the department's Family Care program. Included in these provisions are standards for confidentiality which prohibit disability benefit specialists from disclosing personally identifying information about a client without the client's consent unless required by law. Because disability benefit specialists are permissive reporters, and thus not required to report abuse, neglect, or financial exploitation of elder adults and adults at risk under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., s. HFS 10.23 (2) (d) 2., effectively prevents disability benefits specialists from making such disclosures.

Amending s. HFS 10.23 (2) (d) 2., to allow disability benefit specialists to report abuse, neglect, or financial exploitation under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., would help to ensure that elder adults and adults-at-risk who may have been abused, neglected, or financially exploited are brought to the attention of the abuse, neglect and exploitation response systems outlined under ss. 46.90 and 55.043, Stats.

**SUMMARY OF EMERGENCY RULE**

**Statutes interpreted:** Sections 46.90, 55.02, 55.043, Stats.

**Statutory authority:** Sections 46.288 (1) and 227.11 (2) (a), Stats.

**Explanation of agency authority:**

The department's responsibilities for adult protective services are outlined under s. 55.02, Stats., and include requirements for the department to develop and operate a coordinated, statewide system for protective services and protective placements in cooperation with county departments. Section 55.01 (6r), Stats., defines protective services to include identification of individuals in need of services to keep the individual safe from abuse, neglect or financial exploitation.

The department is required under s. 46.288 (1), Stats., to promulgate as rules prescribing the standards for performance by resource centers and for certification of care management organizations, including requirements for maintaining quality assurance and quality improvement. Section 227.11 (2) (a), Stats., provides the department, as a state agency, with general rulemaking

authority interpreting the provisions of any statute enforced or administered by the department if the department considers it necessary to effectuate the purpose of the statute.

**Related statute or rule:**

See the "Statutes interpreted" and "Statutory authority" sections of this emergency order.

**Plain language analysis:**

Chapter HFS 10 is the department's rule that guides the implementation of the department's Family Care program. Included in these provisions are standards for confidentiality which prohibit disability benefit specialists from disclosing personally identifying information about a client without the client's consent unless required by law. Because disability benefit specialists are permissive reporters, and thus not required to report abuse, neglect, or financial exploitation of elder adults and adults at risk under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., s. HFS 10.23 (2) (d) 2., effectively prevents disability benefits specialists from making such disclosures.

In this emergency order the department has revised s. HFS 10.23 (2) (d) 2., by adding language that would permit disability benefit specialists to report abuse, neglect, or financial exploitation of elder adults or adults-at-risk without violating that section's non-disclosure provisions.

Amending s. HFS 10.23 (2) (d) 2., to allow disability benefit specialists to report abuse, neglect, or financial exploitation under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., would help to ensure that elder adults and adults-at-risk who may have been abused, neglected, or financially exploited are brought to the attention of the abuse, neglect and exploitation response systems outlined under ss. 46.90 and 55.043, Stats.

**Summary of, and comparison with, existing or proposed federal regulations:**

42 USC 3058i (b) 8 (A) directs the state Unit on Aging (DHS-Bureau of Aging and Disability Resources) to promote the development of an elder abuse, neglect, and exploitation (ANE) to, among other requirements, include administrative procedures as may be necessary or appropriate to ensure that the state will deal effectively with ANE cases in the state and, to coordinate the programs with other state and local programs and services for the protection of vulnerable adults, including adult protective services.

**Comparison with rules in adjacent states:**

**Illinois:** Illinois does not have a program similar to Family Care.

**Iowa:** Iowa does not have a program similar to Family Care.

**Michigan:** Michigan does not have a program similar to Family Care.

**Minnesota:** Minnesota does not have a program similar to Family Care.

**Summary of factual data and analytical methodologies:**

In response to questions concerning the role of resource center disability benefit specialists in protective services, the department reviewed and analyzed its administrative rules and policies and



determined that changes were needed to ensure that its administrative rules reflect its responsibilities to coordinate and maintain a protective service system for elder adults and adults-at-risk.

**Analysis and supporting documents used to determine effect on small business:**

The rules do not affect businesses.

**Effect on small business:**

The rules do not affect businesses.

**Agency contact person:**

Jane A. Raymond, Advocacy & Protection Systems Developer  
Department of Health Services  
DLTC/Bureau of Aging and Disability Resources  
1 West Wilson Street, Room 450  
Madison, WI 53702  
Jane.raymond@dhs.wisconsin.gov  
608-266-2568

**Place where comments are to be submitted and deadline for submission:**

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin Administrative Rules Website at <http://adminrules.wisconsin.gov> after the hearing is scheduled.

**TEXT OF PROPOSED RULE**

Section HFS 10.23 (2) (d) 2., is amended to read:

HFS 10.23 (2) (d) 2. Notwithstanding sub. (7) (b), a benefit specialist may not disclose information about a client without the informed consent of the client, unless required by law or as permitted under ss. 55.043 (1m) (br) or 46.90 (4) (ar), Stats.

EFFECTIVE DATE: The rules contained in this order shall take effect as emergency rules October 27, 2008.

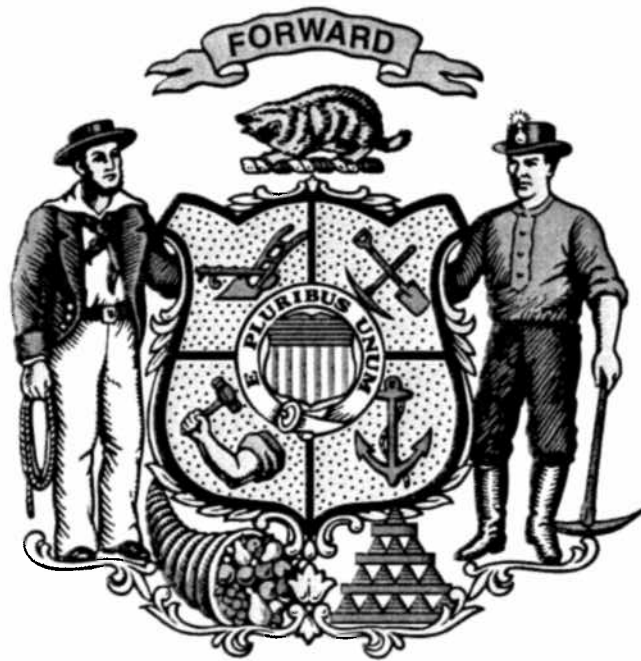
Wisconsin Department of Health Services

Dated: October 24, 2008



Karen E. Timberlake, Department Secretary

SEAL:



## DHS 10 Emergency Rule Extension

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### **PUBLIC HEARING**

#### **Joint Committee for Review of Administrative Rules**

Thursday, March 26, 2009

10:00 AM

415 Northwest

Senator Jim Holperin

Representative Josh Zepnick

### **DHS 10 Emergency Rule Extension**

To promulgate rules to make disability benefit specialists "permissive" reporters of abuse, neglect, and financial exploitation.

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#### **Summary of DHS 10:**

The proposed rule allows disability benefit specialists working in Aging and Disability Centers in Wisconsin to report abuse, neglect and financial exploitation to the county Elder Adults/Adults-at-Risk (EA/AAR) agency. Under Wisconsin law, **elderly** benefit specialists are "permissive" reporters, meaning they are allowed, but not required, to report. This rule change will make disability benefit specialists permissive reporters like elderly benefit specialists.

#### **Why is it important and what precipitated the need to implement?**

Elder abuse and abuse of younger adults at risk are some of the most under-reported crimes in the nation. That is why the legislature passed new laws in 2005 defining many professionals (health care providers, social workers, etc.) as "limited required reporters" of abuse to elder adults/adults at risk. Many adults at risk are too frightened to report, blame themselves for the abuse, do not understand that what they are experiencing is abuse, or are too embarrassed about the abuse to report. While any stigma to reporting remains, we need professionals who work with adults at risk to help us identify abuse, neglect and exploitation.

#### **Why is DHS seeking an extension of the emergency rule?**

DHS implemented DHS 10 as an emergency rule as of November 3, 2008. DHS is seeking a 60 day extension of the emergency rule to ensure the rule is extended while the permanent rule is being reviewed in standing committee.

DHS has received contact from several disability benefit specialists in the state who feel that their client is being abused but they do not think they can legally report abuse. This rule change makes them permissive reporters meaning they are allowed, but not required, to report. Allowing them to report will help ensure the safety of individuals who would otherwise remain at risk of abuse, neglect or exploitation.

#### **When does the current ER expire?**

April 2, 2009

#### **When was the DHS public hearing for the rule? Who attended?**

Disability Rights Wisconsin (DRW) attended the public hearing which was held on both the emergency and permanent rule on January 27, 2009.

#### **What stakeholders were consulted and what were their concerns? How did we address the concerns?**

DRW asked to include language currently in the statutes defining when disability benefit specialists may report. That language was added and DRW has no further objection. DRW staff supervise disability benefit specialists.

## **DHS 10 Emergency Rule Extension**

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DHS met with the Coalition of Wisconsin Aging to clarify the rule change. This group works with elderly benefit specialists, who are not affected by this rule change.

### **What is the status of the corresponding permanent rule?**

The permanent rule is currently in the legislative review process and has been referred to . DHS anticipate the legislative review period will expire late April.

### **Any other important information to know?**

At the time that Family Care was created, elderly benefit specialists already existed. Elderly benefit specialists are supervised by attorneys and thereby can report under attorney statutes. [Wis. Stats. 55.043 (1m) (br)] As defined under Family Care rule, the disability benefit specialist model is slightly different. Disability benefit specialists are not supervised by attorneys so cannot report under Wisconsin law.

Many reporters, both permissive and limited required reporters, have confidential relationships with their clients. This rule change allows, not requires, disability benefit specialists to report abuse, neglect and financial exploitation. Even limited required reporters can choose not to report if they believe that reporting is not in the best interest of the adult at risk.

Also, the rule change will provide disability benefit specialists protection from liability for good faith reporting.



# DHS 12 Emergency Rule Extension

## PUBLIC HEARING

### Joint Committee for Review of Administrative Rules

Thursday, March 26, 2009

10:00 AM

415 Northwest

Senator Jim Holperin

Representative Josh Zepnick

Exp. 3/31

## DHS 12 Emergency Rule Extension

To promulgate rules to specify crimes for which an entity must disclose a conviction, to a client or the client's guardian, of a caregiver who is assigned to provide personal care services to a client in the client's personal residence and to specify who is a substitute caregiver.

### Summary of DHS 12:

The proposed rule specifies crimes, for which an entity must disclose to a client or the client's guardian, a conviction of a caregiver who is assigned to provide personal care services to the client in the client's personal residence. The list includes all of the crimes currently listed under s. 50.065 (1) (e), Stats., that are already used by entities to determine an individual's eligibility to work for the entity as a caregiver, and the following additional crimes:

- Theft
- Robbery
- Financial card transactions crimes
- Identity theft
- Drug crimes

The proposed rule also includes a definition of the term "substitute caregiver."

### Why is it important and what precipitated the need to implement?

2007 Wisconsin Act 172 created Section 50.065 (2m) (d), Stats., requires the Department to promulgate rules to specify crimes for which an entity must disclose to a client or the client's guardian, a conviction of a caregiver who is assigned to provide personal care services to the client in the client's personal residence and to specify who is a "substitute caregiver".

current  
list of  
crimes...

### Why are we seeking an extension of the emergency rule?

The Department of Health Services found that an emergency existed and that the adoption of an emergency rule was necessary based on the following information:

- 2007 Wisconsin Act 172 requires the department to specify by rule, the crimes, a conviction of which an entity must disclose to a client or a client's guardian before the caregiver provides the client with personal care services in the client's home and to define the term "substitute caregiver".
- Beginning November 1, 2008, entities are required to disclose to the client or the client's guardian, the assigned caregiver's convictions of crimes specified by the department by rule.
- The Department was not able to complete the rulemaking process prior to the November 1, 2008 effective date. Personal care providers would not have been able to comply with the statutory requirement.

## DHS 12 Emergency Rule Extension

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- Should the emergency rule expire there will be a gap in regulation. The personal care agencies would not have a crimes list to use to run the background checks that they are required under statute to perform, and to notify clients as appropriate.

### **When does the current ER expire (if applicable)?**

The current emergency rule expires March 31, 2009.

### **When was the DHS public hearing for the emergency rule? Who attended?**

The DHS public hearing was held January 6, 2009.

Attending in person:

- Burton A. Wagner, attorney representing personal care agency
- Amy Mlot, Society's Assets, Inc.
- Laurie Hints, personal care provider
- Ruth Ann Zwiefelhofer, Society's Assets, Inc.
- John Hendrick, Coalition of Wisconsin Aging Groups
- Dan Hayes

Submitted written comments:

- Forbes McIntosh, Government Policy Solutions for:
- Residential Services Association (RSA) of Wisconsin
- Community Alliance of Providers of Wisconsin (CAPOW)

### **What stakeholders were consulted and what were their concerns? How did we address the concerns?**

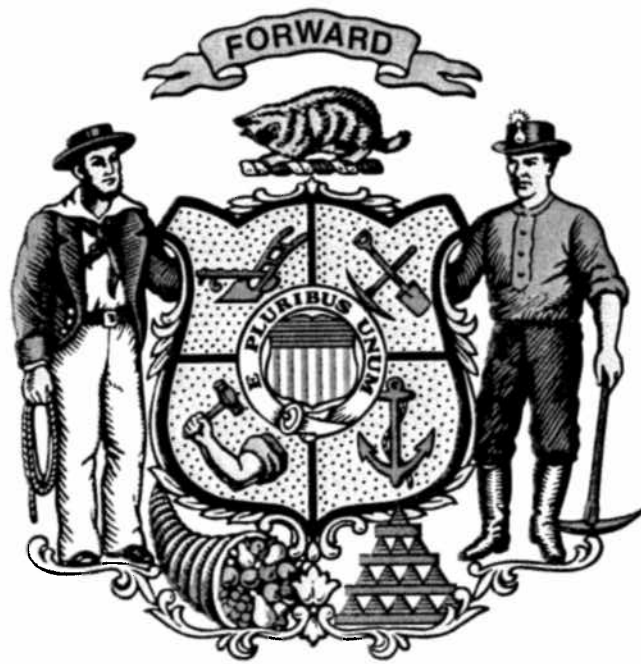
The Department solicited comments from representatives from the Disability Rights Wisconsin, Inc., the Board on Aging and Long Term Care (BOALTC), the Wisconsin Coalition of Aging Groups (CWAG), Independence First, Association of Retarded Citizens, Wisconsin Personal Services Association (WPSA), Community Alliance of Providers of Wisconsin (CAPOW), representatives from the Home Care Advisory Committee (HCAC) and the Home Care Consumer Advisory Committee (HCCAC), and legislators.

Representatives from these organizations reviewed the initial draft of the rule including a list of crimes and a definition of "substitute caregiver". The Department revised the rule based upon comments received.

Some commenters asked that the Department to limit disclosure of less serious crimes that caused no physical harm. Commenters also recommended that a time limit be placed on disclosure of certain crimes. Other commenters spoke in supports the disclosure of financial crimes and said the list of crimes does not bar employment but only requires that the entity disclose the conviction. The Department revised the crimes list based upon comments received.

### **What is the status of the corresponding permanent rule?**

The legislative report and final proposed rule was submitted to the legislature on February 27, and will be under the legislative review until at least mid April.







State of Wisconsin  
Department of Health Services

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Jim Doyle, Governor  
Karen E. Timberlake, Secretary

May 12, 2009

The Honorable Jim Holperin, Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 409 South, State Capitol  
Madison, Wisconsin 53707

The Honorable Josh Zepnick, Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 219 North, State Capitol  
Madison, Wisconsin 53708

Dear Senator Holperin and Representative Zepnick:

This letter is a request for a second extension of the Department's emergency order relating to s. DHS 10.23 (2), confidentiality requirements for disability specialists under the Family Care program. This request for a second extension is to extend the effective period of the emergency order, which will expire on May 31, 2009, for 30 days through June 30, 2009. The Department has determined that it will not be possible for the permanent rules to become effective before May 31, 2009. The Department will file the adopted permanent rules with the Legislative Reference Bureau by May 14, 2009. Based on the rule publication requirements under ch. 227, Stats., the anticipated effective date of the permanent rule would be July 1, 2009.

The Department issued the emergency order revising s. DHS 10.23, to permit disability benefit specialists to report abuse, neglect, or financial exploitation of elder adults or adults-at-risk without violating the rule's non-disclosure provisions which is currently prohibited under s. DHS 10.23 (2) (d) 2. Because disability benefit specialists are permissive reporters, and thus not required to report abuse, neglect, or financial exploitation of elder adults and adults at risk under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., s. DHS 10.23 (2) (d) 2., effectively prevents disability benefits specialists from making such disclosures.

The changes to s. DHS 10.23 (2) (d) 2., helps to ensure that elder adults and adults-at-risk who may have been abused, neglected, or financially exploited are brought to the attention of the abuse, neglect and exploitation response systems outlined under ss. 46.90 and 55.043, Stats. If the emergency order is allowed to expire, the potential abuse, neglect, or financial exploitation of elder adults and adults-at-risk may go unreported and needed

Page 2  
May 12, 2009

services not being provided. The Department's responsibilities for adult protective services are outlined under s. 55.02, Stats. Section 55.01 (6r), Stats., defines protective services to include identification of individuals in need of services to keep the individual safe from abuse, neglect or financial exploitation.

A copy of the emergency order is attached to this letter. If you have questions about the rules, please contact Rosie Greer at 608-266-1279.

Sincerely,

Karen E. Timberlake  
Secretary

Attachments

cc Senator Fred Risser  
Speaker Michael Sheridan

**ADMINISTRATIVE RULES  
ORDER OF THE  
DEPARTMENT OF HEALTH SERVICES  
ADOPTING EMERGENCY RULES**

The Wisconsin Department of Health Services hereby adopts emergency rules to amend s. HFS 10.23 (2) (d) 2., relating to confidentiality requirements of the Family Care program that prohibit benefit specialists from disclosing personally identifying information about a client without the client's informed consent, unless required by law.

**FINDING OF EMERGENCY**

The Department of Health Services finds that an emergency exists and that adoption of an emergency rule is necessary for the immediate preservation of the public health, safety and welfare. The facts constituting the emergency are as follows:

Chapter HFS 10 is the department's rule that guides the implementation of the department's Family Care program. Included in these provisions are standards for confidentiality which prohibit disability benefit specialists from disclosing personally identifying information about a client without the client's consent unless required by law. Because disability benefit specialists are permissive reporters, and thus not required to report abuse, neglect, or financial exploitation of elder adults and adults at risk under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., s. HFS 10.23 (2) (d) 2., effectively prevents disability benefits specialists from making such disclosures.

Amending s. HFS 10.23 (2) (d) 2., to allow disability benefit specialists to report abuse, neglect, or financial exploitation under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., would help to ensure that elder adults and adults-at-risk who may have been abused, neglected, or financially exploited are brought to the attention of the abuse, neglect and exploitation response systems outlined under ss. 46.90 and 55.043, Stats.

**SUMMARY OF EMERGENCY RULE**

**Statutes interpreted:** Sections 46.90, 55.02, 55.043, Stats.

**Statutory authority:** Sections 46.288 (1) and 227.11 (2) (a), Stats.

**Explanation of agency authority:**

The department's responsibilities for adult protective services are outlined under s. 55.02, Stats., and include requirements for the department to develop and operate a coordinated, statewide system for protective services and protective placements in cooperation with county departments. Section 55.01 (6r), Stats., defines protective services to include identification of individuals in need of services to keep the individual safe from abuse, neglect or financial exploitation.

The department is required under s. 46.288 (1), Stats., to promulgate as rules prescribing the standards for performance by resource centers and for certification of care management organizations, including requirements for maintaining quality assurance and quality improvement. Section 227.11 (2) (a), Stats., provides the department, as a state agency, with general rulemaking

authority interpreting the provisions of any statute enforced or administered by the department if the department considers it necessary to effectuate the purpose of the statute.

**Related statute or rule:**

See the "Statutes interpreted" and "Statutory authority" sections of this emergency order.

**Plain language analysis:**

Chapter HFS 10 is the department's rule that guides the implementation of the department's Family Care program. Included in these provisions are standards for confidentiality which prohibit disability benefit specialists from disclosing personally identifying information about a client without the client's consent unless required by law. Because disability benefit specialists are permissive reporters, and thus not required to report abuse, neglect, or financial exploitation of elder adults and adults at risk under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., s. HFS 10.23 (2) (d) 2., effectively prevents disability benefits specialists from making such disclosures.

In this emergency order the department has revised s. HFS 10.23 (2) (d) 2., by adding language that would permit disability benefit specialists to report abuse, neglect, or financial exploitation of elder adults or adults-at-risk without violating that section's non-disclosure provisions.

Amending s. HFS 10.23 (2) (d) 2., to allow disability benefit specialists to report abuse, neglect, or financial exploitation under ss. 46.90 (4) (ar) and 55.043 (1m) (br), Stats., would help to ensure that elder adults and adults-at-risk who may have been abused, neglected, or financially exploited are brought to the attention of the abuse, neglect and exploitation response systems outlined under ss. 46.90 and 55.043, Stats.

**Summary of, and comparison with, existing or proposed federal regulations:**

42 USC 3058i (b) 8 (A) directs the state Unit on Aging (DHS-Bureau of Aging and Disability Resources) to promote the development of an elder abuse, neglect, and exploitation (ANE) to, among other requirements, include administrative procedures as may be necessary or appropriate to ensure that the state will deal effectively with ANE cases in the state and, to coordinate the programs with other state and local programs and services for the protection of vulnerable adults, including adult protective services.

**Comparison with rules in adjacent states:**

**Illinois:** Illinois does not have a program similar to Family Care.

**Iowa:** Iowa does not have a program similar to Family Care.

**Michigan:** Michigan does not have a program similar to Family Care.

**Minnesota:** Minnesota does not have a program similar to Family Care.

**Summary of factual data and analytical methodologies:**

In response to questions concerning the role of resource center disability benefit specialists in protective services, the department reviewed and analyzed its administrative rules and policies and

determined that changes were needed to ensure that its administrative rules reflect its responsibilities to coordinate and maintain a protective service system for elder adults and adults-at-risk.

**Analysis and supporting documents used to determine effect on small business:**

The rules do not affect businesses.

**Effect on small business:**

The rules do not affect businesses.

**Agency contact person:**

Jane A. Raymond, Advocacy & Protection Systems Developer  
Department of Health Services  
DLTC/Bureau of Aging and Disability Resources  
1 West Wilson Street, Room 450  
Madison, WI 53702  
Jane.raymond@dhfs.wisconsin.gov  
608-266-2568

**Place where comments are to be submitted and deadline for submission:**

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin Administrative Rules Website at <http://adminrules.wisconsin.gov> after the hearing is scheduled.

**TEXT OF PROPOSED RULE**

Section HFS 10.23 (2) (d) 2., is amended to read:

HFS 10.23 (2) (d) 2. Notwithstanding sub. (7) (b), a benefit specialist may not disclose information about a client without the informed consent of the client, unless required by law or as permitted under ss. 55.043 (1m) (br) or 46.90 (4) (ar), Stats.

EFFECTIVE DATE: The rules contained in this order shall take effect as emergency rules October 27, 2008.

Wisconsin Department of Health Services

Dated: October 24, 2008

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Karen E. Timberlake, Department Secretary

SEAL:





State of Wisconsin  
Department of Health Services

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Jim Doyle, Governor  
Karen E. Timberlake, Secretary

May 12, 2009

The Honorable Jim Holperin, Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 409 South, State Capitol  
Madison, Wisconsin 53707

The Honorable Josh Zepnick, Co-Chairperson  
Joint Committee for Review of Administrative Rules  
Room 219 North, State Capitol  
Madison, Wisconsin 53708

Dear Senator Holperin and Representative Zepnick:

The Department issued an emergency order, effective November 1, 2008, modifying ch. DHS 12, to promulgate rules to specify crimes for which an entity must disclose a conviction, to a client or the client's guardian, of a caregiver who is assigned to provide personal care services to a client in the client's personal residence and to specify who is a "substitute caregiver". The rulemaking is required by the Legislature, under s. 50.065 (2m) (d), Stats., as created by 2007 Act 172.

This is to request that the Joint Committee for Review of Administrative Rules grant the Department a second extension of the effective period of the emergency order by 32 days, through June 30, 2009. The Department has determined that it will not be possible for the permanent rules to become effective before the emergency rules expire on May 29, 2009. The Department will file the adopted permanent rules with the Legislative Reference Bureau on May 14, 2009. Based on the publication requirements under ch. 227, Stats., the anticipated effective date of the permanent rules would be July 1, 2009.

The proposed rules meet the requirements of s. 50.065 (2m) (d), Stats., by including a definition of the term "substitute caregiver" and a list of crimes that require disclosure for caregivers providing personal care services. This list includes all of the crimes currently listed under s. 50.065 (1) (e), Stats., which entities already use, including entities serving persons under the age of 18, to determine an individual's eligibility to work for the entity as a caregiver, and includes the following additional crimes:

- Theft
- Robbery
- Financial card transaction crimes
- Identity theft
- Drug crimes

A copy of the emergency order is attached to this letter. If you have questions about the rules, please contact Rosie Greer at 608-266-1279.

Sincerely,

Karen E. Timberlake  
Secretary

Attachments

cc Senator Fred Risser  
Speaker Michael Sheridan



**ORDER OF  
DEPARTMENT OF HEALTH SERVICES  
ADOPTING EMERGENCY RULES**

The Wisconsin Department of Health Services hereby adopts emergency rules to repeal HFS 12.03 (15) and to create HFS 12.03 (20m), 12.115 and Table HFS 12.115, relating to background checks of individuals who provide personal care services, and affecting small businesses.

**FINDING OF EMERGENCY**

The Department of Health Services finds that an emergency exists and that the adoption of an emergency rule is necessary for the immediate preservation of the public health, safety and welfare. The facts constituting the emergency are as follows:

2007 Wisconsin Act 172 requires the department to specify by rule, the crimes, a conviction of which an entity must disclose to a client or a client's guardian before the caregiver provides the client with personal care services in the client's home. Act 172 also requires the department to define the term "substitute caregiver". Under s. 50.065 (2m) (d), Stats., as created by 2007 Wisconsin Act 172, the department created a list of crimes required and also as required defined the term "substitute caregiver".

Effective November 1, 2008, entities, including home health agencies and temporary employment agencies, are required under s. 50.065 (2m) (d), Stats., to disclose to the client or the client's guardian, the assigned caregiver's convictions of crimes specified by the department by rule.

**SUMMARY OF EMERGENCY RULE**

**Statute interpreted:**

Section 50.065 (1) (e), Stats.

**Statutory authority:**

Section 50.065 (2m) (d), Stats., as created by 2007 Wisconsin Act 172, and 227.11 (2) (a), Stats.

**Explanation of agency authority:**

Section 50.065 (2m) (d), Stats., requires the Department to promulgate rules to specify crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services to a client in the client's personal residence and to specify who is a "substitute caregiver".

Section 227.11 (2) (a), Stats., allows agencies to promulgate rules interpreting the provision of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

**Related statute or rule:**

Chapter HFS 13.

**Plain language analysis:**

Section 50.065 (2m) (d), Stats., requires the Department to promulgate rules to specify crimes for which an entity must disclose to a client or the client's guardian, a conviction of a caregiver who is assigned to provide personal care services to the client in the client's personal residence and to specify who is a "substitute caregiver". These requirements were established under 2007 Act 172.

This emergency order includes a definition of the term "substitute caregiver." It also includes a list of crimes that require disclosure for caregivers providing personal care services. They include all of the crimes currently listed under s. 50.065 (1) (e), Stats., that are already used by entities to determine an individual's eligibility to work for the entity as a caregiver, and the following additional crimes:

- Theft
- Robbery
- Financial card transactions crimes
- Identity theft
- Drug crimes

**Summary of, and comparison with, existing or proposed federal regulations:**

There are no known existing or proposed related federal regulations.

**Comparison with rules in adjacent states:****Illinois:**

Illinois has no list of crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services.

**Iowa:**

Iowa has no list of crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services.

**Michigan:**

Michigan has no list of crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services.

**Minnesota:**

Minnesota has no list of crimes for which an entity must disclose a conviction to a client or the client's guardian of a caregiver who is assigned to provide personal care services.

**Summary of factual data and analytical methodologies:**

The Department solicited comments from representatives from the Disability Rights Wisconsin, Inc., the Board on Aging and Long Term Care (BOALTC), the Wisconsin Coalition of Aging Groups (CWAG), Independence First, Association of Retarded Citizens, Wisconsin Personal Services Association (WPSA), Community Alliance of Providers of Wisconsin (CAPOW), representatives from the Home Care Advisory Committee (HCAC) and the Home Care Consumer Advisory Committee (HCCAC), and legislators. Representatives from these organizations reviewed the initial draft of the rule including a list

of crimes and a definition of "substitute caregiver". The Department revised the rule based upon comments received.

**Analysis and supporting documents used to determine effect on small business:**

The small businesses affected by this emergency order are temporary employment agencies and home health agencies, and any other agency that may assign individuals to provide personal care services to clients in the clients' private residence. This emergency order would not have a fiscal impact on small businesses over and above the costs imposed by the requirements established by Act 172 under s. 50.065 (2m), Stats., for entities to conduct background checks, including criminal history checks, on individuals the entity assigns to provide personal care services in a client's private residence and disclose the results to the client or the client's guardian.

**Effect on small business:**

This emergency order would not have a fiscal impact on small businesses over and above the costs imposed by the requirements established by Act 172 under s. 50.065 (2m), Stats., for entities to conduct background checks, including criminal history checks, on individuals the entity assigns to provide personal care services in a client's private residence and disclose the results to the client or the client's guardian.

**Agency contact person:**

Pat Benesh, Quality Assurance Program Spec-Senior  
DHS Division of Quality Assurance  
1 West Wilson St. Rm. 1150  
Madison, WI 53701  
Phone: 608-264-9896  
Fax: 608-267-7119  
Patricia.Benesh@Wisconsin.gov

**Place where comments are to be submitted and deadline for submission:**

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin Administrative Rules Website at <http://adminrules.wisconsin.gov> after the hearing is scheduled.

TEXT OF EMERGENCY RULE

SECTION 1. HFS 12.03 (15) is repealed.

SECTION 2. HFS 12.03 (20m) is created to read:

HFS 12.03 (20m) "Substitute caregiver" means an individual who provides personal care services to the client for 7 or fewer days in a 90 day period.

SECTION 3. HFS 12.115 is created to read:

**HFS 12.115 Personal care services, disclosure of convictions.** Pursuant to s. 50.065 (2m) (d) Stats., Table HFS 12.115 lists the crimes for which an entity must disclose under s. 50.065 (2m) (a) 1., Stats., a conviction of a caregiver who provides personal care services to a client or the client's guardian.

Table HFS 12.115

Wisconsin Statutes	Crime
940.19 (3), 1999 Stats.	Battery
940.01	First-degree intentional homicide
940.02	First-degree reckless homicide
940.03	Felony murder
940.05	Second-degree intentional homicide
940.12	Assisting suicide
940.19 (2), (4), (5) or (6)	Battery (felony)
940.22 (2) or (3)	Sexual exploitation by therapist; duty to report
940.225 (1), (2), or (3)	1 <sup>st</sup> , 2 <sup>nd</sup> , or 3 <sup>rd</sup> degree sexual assault
940.285 (2)	Abuse of individuals at risk
940.29	Abuse of residents of penal facilities
940.295	Abuse or neglect of patients and residents
943.20	Theft
943.201	Unauthorized use of an individual's personal identifying information or documents
943.203	Unauthorized use of an entity's identifying information or documents
943.32	Robbery
943.38	Forgery
943.41	Financial transaction card crimes
948.02 (1) or (2)	1 <sup>st</sup> or 2 <sup>nd</sup> degree sexual assault of a child
948.025	Engaging in repeated acts of sexual assault of the same child
948.03 (2) (a), (b) or (c)	Physical abuse of a child
948.05	Sexual exploitation of a child
948.051	Trafficking of a child
948.055	Causing a child to view or listen to sexual activity
948.06	Incest with a child
948.07	Child enticement
948.08	Soliciting a child for prostitution
948.085	Sexual assault of a child placed in substitute care
948.11 (2) (a) or (am)	Exposing a child to harmful material or harmful descriptions or narrations
948.12	Possession of child pornography

948.13	Child sex offender working with children
948.21(1)	Neglecting a child
948.30	Abduction of another's child; constructive custody
948.53	Child unattended in child care vehicle
961.41 (1)	Manufacture, distribution or delivery of a controlled substance or a controlled substance analog
961.41 (1m)	Possession with intent to manufacture, distribute or deliver a controlled substance or a controlled substance analog
961.41 (3g)	Possession or attempt to possess a controlled substance or a controlled substance analog
961.43 (1) (a)	Acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge
961.43 (1) (b)	To make, distribute or possess material designed to reproduce the trademark upon any drug or container or label so as to make a counterfeit substance or to duplicate the physical appearance, form, package or label of a controlled substance
A violation of the law of any other state or United States jurisdiction that would be a violation of a crime listed in this table.	

EFFECTIVE DATE: The rules contained in this order shall take effect as emergency rules on November 1, 2008.

Wisconsin Department of Health Services

Dated: October 13, 2008

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Karen E. Timberlake, Department Secretary

SEAL: