



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 08-098

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

1. Statutory Authority

a. 2007 Wisconsin Act 172 created provisions requiring disclosure about a caregiver’s conviction for certain crimes (to be designated by the Department of Health Services (DHS) by rule) and about certain other records that a caregiver may have (relating to findings of abuse or neglect of a client or misappropriation of a client’s property, substantiated reports of child abuse or neglect, and certain DHS licensing information), as well as disclosure about certain other matters (rehabilitation, availability of certain criminal records for a fee, and exceptions for substitute care providers) if the caregiver provides personal care services to a client in the client’s residence. Act 172 specified that these provisions would take effect on November 1, 2008, and would first apply to placements of caregivers that are made on November 1, 2008 (that is, would apply to placements made on or after November 1, 2008).

The proposed rule includes a proposed effective date of the first day of the month following publication of the proposed rule; it does not include an initial applicability provision. It appears that, as of this date, no emergency rule is in effect regarding this matter. It is unclear how the proposed rule anticipates dealing with the statutory effective date and the statutory initial applicability date.

2. Form, Style and Placement in Administrative Code

a. The term “personal care services” is used in the proposed rule but is not defined. It would be useful to define the term by repealing and recreating s. HFS 12.03 (15) to indicate that: “‘Personal care services’ has the meaning given in s. 50.065 (1) (cr), Stats.” [See s. 1.01 (7) (c), Manual.]

b. The term “substitute caregiver” is defined in s. HFS 12.03 (20m) but is not used in ch. HFS 12. Any term that is defined for purposes of a chapter must be used in the chapter.

An example of where the defined term could be used is s. HFS 12.115, which could be revised to use the defined term “substitute caregiver” in order to accurately reflect the law with regard to the exception for substitute caregivers in s. 50.065 (2m) (b), Stats., to disclosure of convictions for certain crimes. Specifically, s. HFS 12.115 provides a list of crimes for which an entity must disclose a conviction of a caregiver who provides personal care services. A sentence could be added to the end of s. HFS 12.115 (preceding the table) stating that this section does not apply to a substitute caregiver; alternatively, the phrase “caregiver who” could be changed to “caregiver, other than a substitute caregiver, who.”

In addition, some linkage to s. 50.065 (2m) (a) 4. and (b), Stats., is needed in the proposed rule. A section could be created stating that: “For purposes of s. 50.065 (2m) (a) 4. and (b), Stats., ‘substitute caregiver’ has the meaning given in s. HFS 12.03 (20m).”

4. Adequacy of References to Related Statutes, Rules and Forms

a. The summary of the proposed rule indicates that the statute interpreted is s. 50.065 (1) (e), Stats. However, s. 50.065 (1) (e) is simply the list of “serious crimes” under the caregiver background check law. Section 50.065 (1) (e) is not being interpreted as the list of serious crimes is not being affected by the proposed rule.

Rather, the statutes being interpreted appear to be the following:

- Section 50.065 (2m) (a) 1., Stats., relating to the crimes for which conviction of a caregiver providing personal care services in a client’s residence must be disclosed to the client or client’s guardian.
- Section 50.065 (2m) (a) 4. and (b), Stats., relating to the exception made for substitute caregivers with regard to disclosure of convictions for the specified crimes and for certain other records, and relating to the notice that must be provided about this exception.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The second paragraph of the analysis indicates that the proposed rule lists the crimes that require disclosure for caregivers providing personal care services. The third sentence states that the list includes all of the crimes currently listed in 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

further states that the rule lists the following additional crimes. (The crimes then listed in the table in s. HFS 12.115 include all of the crimes in both s. 50.065 (1) (e) 1., Stats. (serious crimes for all ch. 50 entities) and s. 50.065 (1) (e) 2., Stats. (additional serious crimes applicable only with respect to ch. 50 entities that serve persons under the age of 18), as well as some additional crimes).

The first part of this statement in the analysis implies that all of the crimes currently listed in s. 50.065 (1) (e), Stats., already determine an individual's eligibility to work as a caregiver for all entities. However, that statement is correct only with respect to entities that serve persons under the age of 18. This should be clarified.

b. The definition of "substitute care provider" in s. HFS 12.03 (20m) refers to an individual who provides personal care services to "the client for 7 or fewer days in a 90 day period." The use of the definite article "the" is unclear as the definition does not refer to a specific client. The definition would be clearer if it included language such as "...means, with respect to a client who is receiving personal care services, an individual who provides personal care services to the client for 7 or fewer days in a 90-day period."

Also, "90 day period" should be changed to "90-day period."

c. Section HFS 12.115 refers to a list of crimes for which an entity must disclose a conviction of a caregiver who provides personal care services to a client or the client's guardian. This is confusingly worded as it could be read as referring to providing services to a client or the client's guardian.

In contrast, the statutes specify that the disclosure is to a client or a client's guardian with respect to a caregiver who provides personal care services to the client. Section HFS 12.115 should be restructured to make this clear.

In addition, it would be useful if s. HFS 12.115 were more complete by also specifying that it applies to providing personal care services to a client *in the client's residence*.