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)	1st , 2nd, or 3rd 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)	1st or 2nd 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: