

ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
REPEALING, REPEALING AND RECREATING, AND CREATING RULES

To repeal s. HFS 107.12 (2) (b) and (3) (d); to repeal and recreate s. HFS 107.113 (5) (d); and to create s. HFS 107.113 (5) (g) and 107.12 (4) (f) and (g), relating to private duty nursing and respiratory care service benefits covered by the Wisconsin Medical Assistance program, and affecting small businesses.

RULE SUMMARY

**Statute interpreted:** Section 49.46 (2) (a) 4. d. and (b) 6. g. and m., Stats.

**Statutory authority:** Section 49.45 (10) and 49.46 (2) (b) 6. g., Stats.

**Explanation of agency authority:**

Section 49.45 (10), Stats., authorizes the Department to promulgate rules consistent with its duties in administering Medical Assistance, including its duties relating to reimbursement for private duty nursing services by certified providers.

**Related statutes or rules**

The Department believes that the following statutory provisions are related to these proposed rule changes:

- Section 49.43 (4), Stats., which defines the term “home health agency.” Nurses employed by home health agencies are affected by this proposed rule;
- Section 49.45 (8), Stats., addresses per-visit limits on home health services reimbursement;
- Section 49.45 (8m), Stats., addresses reimbursement rates for respiratory care services;

**Plain language analysis:**

The Department proposes to revise ss. HFS 107.113 (5) and 107.12 (2) to (4) relating to the number of hours a nurse may provide private duty nursing services, including care to ventilator-dependent recipients, for reimbursement by Medicaid. Specifically, the proposed revisions will become more flexible to facilitate scheduling but restrict the total number of hours a nurse may work and still receive Medicaid reimbursement for such services.

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

42 CFR pt. 440.70 provides the regulatory authority to provide home health services under the Medicaid program. The federal regulation is less detailed than the proposed rule. The Department believes that its proposed administrative rule changes are necessary to ensure the quality of care private duty nursing provided to Medicaid recipients and the judicious use of the Medical Assistance funds the Department is responsible for managing.

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

To compare Wisconsin's existing program, and the proposed rule changes, to those of adjoining states, one must consider two aspects: the breadth and scope of services provided, and the restrictions placed on those services.

### *- Services Provided*

Only Wisconsin and Minnesota offer private duty nursing services (PDN) to a broad array of recipients. Wisconsin covers PDN (including services to ventilator-dependent recipients) as an optional benefit to all that qualify regardless of age. Wisconsin reimburses registered nurses (RNs) and licensed practical nurses (LPNs) as well as home health agencies for PDN. At this time, nurses in independent practice provide most PDN services. Minnesota covers PDN (including to ventilator-dependent recipients) as a Medicaid fee-for-service benefit to all who qualify and receive prior authorization. Minnesota also distinguishes complex from regular PDN. Minnesota reimburses home health agencies, RNs and LPNs with a Class A license. An LPN must renew this license annually to continue to provide services without the direct, on-site supervision of an RN.

The PDN benefit is more limited in Illinois, Iowa, and Michigan. Illinois does not offer private duty nursing services as a fee-for-service optional benefit. However, it does offer private duty nursing services through the waiver programs only to those that qualify and are under age 21. Home health agencies provide most of the private duty nursing services and, with a few exceptions (by request), Illinois does allow RNs in independent practice as PDN providers. Illinois does not grant exceptions to LPNs to provide private duty nursing. Adults who require more continuous care than can be provided in a skilled nursing visit, may be authorized for Illinois fee-for-service personal care services that are delivered by a home health agency certified nursing assistant (CNA). Iowa covers PDN under fee-for-service only for those who qualify and are under age 21. Iowa Medicaid reimburses both RNs and LPNs for private duty nursing services. Unlike Wisconsin, Iowa does not cover private duty nursing services (including services to ventilator dependent recipients) for those who are 21 and older. Michigan covers private duty nursing under fee-for-service for its residents under the age of 21. When PDN is provided to beneficiaries 21 and older, it is a waiver service. PDN may be provided by qualifying agency staff or by independent RNs or LPNs.

### *- Restrictions Placed on the Delivery of PDN Services*

Wisconsin proposes to restrict the number of hours a caregiver may work, to prevent a fatigued caregiver from providing services. Wisconsin recipients who are served by home health agencies may report complaints about the quality of care provided to the Bureau of Quality Assurance. However, nurses in independent practice serve most individuals receiving PDN services. There is no official mechanism for recipients to report complaints about the quality of care provided by nurses in independent practice.

Minnesota does not have a stated limit to the number of hours a nurse may provide PDN for any given time period. The limitation for covered service is based on the recipient's needs and by cost. Expenditures on home health services, including PDN, must be less than a fixed dollar amount that is adjusted annually for inflation. The total payment for a month of home health services is less than the total monthly statewide average rate for the case mix classification most appropriate to the recipient. In addition, services may be provided for a ventilator dependent recipient if the screening team determines the recipient's health care needs can be provided in the recipient's residence and the cost of home health services is less than the projected monthly cost of services provided by the least expensive hospital in the recipient's local trade area that is staffed and equipped to provide the recipient's necessary care. Minnesota requires all home care providers to

give a written copy of the home care bill of rights to each client or each client's responsible person. The notice includes specific contact information and a statement offering information about how to file a complaint about the care provided, either to the Office of Health Facility Complaints, in the Minnesota Department of Health, or to the Ombudsman for Older Minnesotans. Since Minnesota Medicaid recipients have a mechanism for reporting complaints about all home care providers, including working for extended periods without sufficient time to rest, abuses of this nature are likelier to be detected than they are in any of the other four states being reviewed in this document. This reporting mechanism is not available to Wisconsin Medicaid recipients.

In Illinois, Iowa and Michigan the case manager for the waiver provides oversight of the service as well as a point of contact for the recipient. Illinois does not limit in code the number of hours a nurse may provide private duty nursing to a recipient. However, those hours that are prior authorized are done on a case-by-case basis.

Iowa limits authorized private duty nursing to 16 hours in a day. The term "day" is not defined. However, limiting authorized hours to 16 per day and only to children (most of whom are likely to have parental oversight) does, to some extent, limit a recipient's exposure to nurses working without adequate rest.

Michigan requires that there be a primary caregiver (i.e., parent, guardian, significant other adult) who resides with a beneficiary under the age of 18 and the caregiver must provide a monthly average of a minimum of eight hours of care during a typical 24-hour period. The caregiver has the flexibility to use the monthly-authorized hours as needed during the month. Michigan does not limit the number of hours a provider may claim Medicaid reimbursement in any time period. Instead, limitations are placed on the primary caregivers of those who receive services.

*- Summary of comparison of Wisconsin benefits, requirements, and proposed revisions*

Wisconsin has more generous benefits than three of the four adjoining states. Minnesota offers a similar array of benefits. In three of the adjoining states, the restrictions placed on the number of hours of home health benefits are at least as restrictive as those proposed by Wisconsin. The fourth state, Minnesota, makes it easy for recipients to report abuses, with the likely result of averting the error-producing fatigue Wisconsin is trying to prevent.

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

The Home Care Consumer Advisory Committee and the Home Care Advisory Committee advise the Department on issues relating to home health care and have requested the rule changes the Department is proposing in this order.

Recent studies on the effect of longer working hours on patient safety have prompted numerous policies and professional health care organizations as well as federal and other state's legislators to propose limiting the number of hours nurses may work. Two prominent and often-cited reports, — the Institute of Medicine report, *Keeping Patients Safe: Transforming the Work Environment of Nurses* and the report *The Working Hours of Hospital Staff Nurses and Patient Safety* published in the *Health Affairs* journal — suggest that overtime hours have a direct and measurable affect on quality of care and patient safety.

In a November 2003 letter to constituent member associations, the American Nurses Association (ANA) urges state regulatory bodies to prohibit nursing staff from providing patient care in any combination of scheduled shifts that involves mandatory or voluntary overtime in excess of 12 hours in any given 24-hour period or in excess of 60 hours per 7-day period. In its "Nursing's

Legislative and Regulatory Initiatives for the 109<sup>th</sup> Congress” (Spring 2005), the ANA states as follows: “A 2003 report from the Institute of Medicine (*Keeping Patients Safe: Transforming the Work Environment of Nurses*) noted that long work hours pose one of the most difficult threats to patient safety. The IOM noted that fatigue slows reaction time, decreases energy, diminishes attention and otherwise contributes to medical errors. The study concluded that elimination of mandatory overtime is essential to safe patient care and healthier nurses. A report commissioned by the Agency for Health Care Research and Quality, and published in the July/August *Health Affairs* reconfirms the link between overtime and medical errors. This report, “The Working Hours of Hospital Staff Nurses and Patient Safety,” found that the risk of making an error greatly increased when nurses worked shifts that were longer than 12 hours, when they worked significant overtime, or when they worked more than 40 hours per week. The study found that the likelihood of making an error was three times higher when nurses worked shifts lasting more than 12.5 hours.”

Essentially, the ANA recommendation is the current Medicaid language which consumers and providers have asked the Department to simplify in order to ease scheduling. Nurse fatigue is a critical issue in home care where, unlike institutions, nurses practice alone without support and back up provided by other medical professionals. The risk of long work hours on patient safety is not exclusive to those hours reimbursed by Medicaid. The Department does not propose changing the current policy that limits the cumulative hours of patient care regardless of payer. To protect Medicaid recipients from nurses choosing to work multiple jobs, the Department recommends continuing to limit coverage to those hours each nurse works that do not exceed the recommended daily and weekly limits. All nursing care provided, regardless of payer, are counted toward the daily and weekly limits.

In the event of unforeseeable events, the proposed rules preserve the Department's authority to continue to reimburse providers for services provided in excess of the limitations.

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

For Wisconsin Medicaid certification to provide private duty nursing (PDN), a home health agency must also meet Medicare conditions of participation. The Bureau of Quality Assurance oversees the licensing of home health agencies (HHAs) and it investigates and responds to recipient complaints. To be certified PDN by Wisconsin Medicaid, nurses in independent practice (NIP) must be either a Wisconsin Licensed Practical Nurse (LPN) or a Wisconsin Registered Nurse (RN). There is neither quality assurance oversight of NIP nor is there an entity that is directly responsible for investigating and responding to recipient complaints about the nursing services they receive from NIP.

Both HHAs and NIP can be certified to provide PDN to recipients of Wisconsin Medicaid fee-for-service, but HHAs are discontinuing the service as the number of certified NIP continues to grow. No governmental HHAs bill for PDN. In current year 2006 only 26 of the 152 Wisconsin Medicaid certified HHAs billed for PDN services. The amount billed by HHAs in state fiscal year 2006 was 22% of the \$40.1 million billed for PDN. As of July 2006 the number of NIP certified by Wisconsin Medicaid to bill for PDN is at 1,536, up from 1,224 in July 2005.

While the new rule will make scheduling easier, it will also continue to support the nurses' need for off-duty time. Preserving the off-duty time to obtain the rest required is important not only to minimize medical errors, but also to maintain the health and well-being of the nurses.

The Home Care Consumer Advisory Committee and the Home Care Advisory Committee advise the Department on issues relating to home health care and have requested the rule changes the Department is proposing in this order.

**Effect on small business:**

The proposed changes will have a beneficial effect on home health care agencies and nurses in independent private duty nursing practice that offer private duty nursing services, by providing these entities and their consumers with better scheduling flexibility.

**Agency contact person:**

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**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 date 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> when the hearing is scheduled.

**RULE TEXT**

SECTION 1. HFS 107.113 (5) (d) is repealed and recreated to read:

HFS 107.113 (5) (d) 1. Except as provided in subd. 2., services provided by an individual nurse under this section that, when combined with services provided to all recipients and other patients under the nurse's care, exceed either of the following limitations:

- a. A total of 12 hours in a calendar day.
  - b. A total of 60 hours in a calendar week.
2. Services may exceed the limitations in subd. 1. when both of the following conditions are met:
- a. The services are approved by the department on a case-by-case basis for circumstances that could not reasonably have been predicted.
  - b. Failure to provide skilled nursing services likely would result in serious impairment of the recipient's health.

SECTION 2. HFS 107.113 (5) (g) is created to read:

HFS 107.113 (5) (g) 1. Except as provided in subd. 2., services provided during any 24-hour period during which the nurse who performs the services has less than 8 continuous and uninterrupted hours off duty.

- 2. Services may exceed the limitations in subd. 1. when both of the following conditions are met:

a. The services are approved by the department on a case-by-case basis for circumstances that could not reasonably have been predicted.

b. Failure to provide skilled nursing services likely would result in serious impairment of the recipient's health.

SECTION 3. HFS 107.12 (2) (b) and (3) (d) are repealed.

SECTION 4. HFS 107.12 (4) (f) and (g) are created to read:

HFS 107.12 (4) (f) 1. Except as provided in subd. 2., services provided by an individual nurse under this section that, when combined with services provided to all recipients and other patients under the nurse's care, exceed either of the following limitations:

a. A total of 12 hours in a calendar day.

b. A total of 60 hours in a calendar week.

2. Services may exceed the limitations in subd. 1. when both of the following conditions are met:

a. The services are approved by the department on a case-by-case basis for circumstances that could not reasonably have been predicted.

b. Failure to provide skilled nursing services likely would result in serious impairment of the recipient's health.

(g) 1. Except as provided in subd. 2., services provided during any 24-hour period during which the nurse who performs the services has less than 8 continuous and uninterrupted hours off duty.

2. Services may exceed the limitations in subd. 1. when both of the following conditions are met:

a. The services are approved by the department on a case-by-case basis for circumstances that could not reasonably have been predicted.

b. Failure to provide skilled nursing services likely would result in serious impairment of the recipient's health.

SECTION 5. EFFECTIVE DATE: This rule takes effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Health and  
Family Services

Dated: April 20, 2007

By: \_\_\_\_\_  
Kevin R. Hayden  
Secretary

SEAL: