

STATEMENT OF SCOPE
WISCONSIN DEPARTMENT OF HEALTH SERVICES

CHAPTER: DHS 88

RELATING TO: Adult Family Homes

RULE TYPE: Emergency

SCOPE TYPE:Original

FINDING OF EMERGENCY: Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule prior to the time it would take to promulgate an equivalent permanent rule. The following rule should be addressed because some 3- to 4-bed adult family homes (AFH)¹ may experience staffing shortages due to COVID-19. Many residents who reside in these facilities are at a higher risk of contracting the virus due to age and pre-existing conditions. Flexibility in staffing will allow providers to maximize available staff.

¹ The proposed emergency rule only applies to 3- and 4-bed AFHs. See s. 50.01 (1)(b) and s. DHS88.02 (5) (defining “adult family home” as “a place where 3 or 4 adults who are not related to the operated reside and receive, care, treatment or services”)

SUMMARY

1. Description of rule objectives

On March 12, 2020, Governor Evers issued Executive Order 72, which, in accordance with s. 323.10, Stats., declared a public health emergency related to COVID-19. Executive Order 72 further designated the Department of Health Services (“the department”) as the lead agency to respond to the public health emergency. The Governor directed the department to take all necessary and appropriate measures to respond to, and prevent the spread of, COVID-19 in the state—including suspending any administrative rule provisions for which strict compliance would prevent, hinder, or delay necessary actions to respond to the emergency and increase the health threat.

On April 3, 2020, Governor Evers and Secretary-designee Palm signed Emergency Order 21, which suspended in part and revised s. DHS 88.04 (1) (b). Section DHS 88.04 (1) (b) requires that resident care staff at AFHs be at least 18 years old. The partial suspension permitted resident care staff at 3- to 4-bed AFHs to be 16 or 17 years old, provided they (1) meet all other training requirements provided in ch. DHS 88, respectively, (2) do not work alone, (3) do not pass medications, and (4) work under supervision.

The Governor's public health emergency declaration expired on May 11, 2020, per s. 323.10, Stats., and that expiration will effectively nullify Emergency Order 21. In order to preserve the public peace, health, safety, and welfare under s. 227.24 (1) (a), Stats., and in accordance with the department's authority under s. 252.02 (4) and (6), Stats., to promulgate rules and implement emergency measures to protect against, and control the spread of, communicable diseases, the department proposes to suspend in part and revise s. DHS 88.04 (1) (b), in a manner consistent with Executive Order 21.

2. Existing policies relevant to the rule and policies proposed to be included in the rule

The resident care staff age requirements in ss. DHS 88.04 (1) (b) limit an AFH's ability to respond to staffing shortages caused by the spread of COVID-19 in Wisconsin. Temporarily suspending and revising this requirement to allow 16- or 17-year-old staff at AFH who meet all other training requirements in ch. DHS 88, work under supervision, do not work alone, and do not pass medications to temporarily work as resident care staff in response to staffing shortages. This temporary suspension and revision to the rule will give ARHs flexibility to maximize available staff, while further ensuring that residents at AFHs continue to receive necessary services from resident care staff without delay.

3. Analysis of policy alternative

There are no reasonable alternatives to the suspension because Governor Evers and Secretary-designee Palm jointly ordered that these above-referenced administrative rules and companion directives be suspended via Emergency Order 21 on April 3, 2020, but that order expired on May 11, 2020.

4. Statutory authority for the emergency rule

a. Explanation of authority to promulgate the proposed emergency rule

The Department is authorized to promulgate the rule based upon explicit statutory language.

b. Statutes that authorize/s the promulgation of the proposed emergency rule

The Department is authorized to promulgate the emergency rule based upon the following statutory sections:

Section 50.02 (1), Stats.: The department may provide uniform, statewide licensing, inspection, and regulation of community-based residential facilities and nursing homes as provided in this subchapter. The department shall certify, inspect, and otherwise regulate adult family homes, as specified under s. 50.032 and shall license adult family homes, as specified under s. 50.033.

Section 50.02 (2) (am), Stats.: The department shall promulgate all of the following rules with respect to adult family homes:

1. For the purposes of s. 50.032, defining the term "permanent basis" and establishing minimum requirements for certification, certification application procedures and forms, standards for operation and procedures for monitoring, inspection, decertification and appeal of decertification. The rules shall be designed to protect and promote the health, safety and welfare of the disabled adults receiving care and maintenance in certified adult family homes.
2. For the purposes of s. 50.033, establishing minimum requirements for licensure, licensure application procedures and forms, standards for operation and procedures for monitoring, inspection, revocation and appeal of revocation.

Section 252.02 (4) and (6), Stats.:

(4) . . . [T]he department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control or suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease

(6) The department may authorize and implement all emergency measures necessary to control communicable diseases.

Section 227.11 (2) (a), Stats.: Rule-making authority is expressly conferred on an agency as follows:

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

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

Section 227.24 (1) (a), Stats.: An agency may, except as provided in s. 227.136 (1), promulgate rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

c. Statutes or rules that will affect the proposed emergency rule or be affected by it

Ch. 50, Stats.

5. Estimates of the amount of time that state employees will spend to develop the emergency rule and other necessary resources

The estimated time for state employees to develop the rule is 40 hours.

6. Description of all of the entities that may be affected by the emergency rule, including any local governmental units, businesses, economic sectors, or public utility ratepayers who may reasonably be anticipated to be affected by the emergency rule

The entities that may be affected by the proposed rule are licensed AFHs, residents and resident representatives of licensed AFHs, and AFH staff.

7. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the emergency rule

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

8. Anticipated economic impact, locally or state wide

The proposed rule will have minimal or no economic impact.

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