

STATEMENT OF SCOPE

WISCONSIN DEPARTMENT OF HEALTH SERVICES

CHAPTER: DHS 10

RELATING TO: Requirements for Adult Long-Term Care

RULE TYPE: Emergency

SCOPE TYPE: Original

FINDING OF EMERGENCY: Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule because: (1) compliance with current requirements that applicants meet face-to-face with agency staff may risk applicant and agency staff exposure to COVID-19; and (2) strict compliance with eligibility redetermination, payment of cost share, performance improvement project, and disenrollment requirements might result in large numbers of enrollees who are at greater risk of contracting COVID-19 (due to age or pre-existing conditions) being involuntarily disenrolled from receiving financial assistance for necessary long-term care and treatment.

SUMMARY

1. Description of rule objective

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 May 4, 2020 Governor Evers and Secretary-designee Palm issued Emergency Order 35, which ordered the suspension of a number of administrative rules, including various sections of ch. DHS 10 related to adult long-term care. These suspensions reduced the risk of COVID-19 exposure to (1) applicants for long-term care benefits and staff processing those applications by suspending requirements that applicants sign their applications in the presence of an agency worker, and (2) agency workers conducting care management organization assessments by suspending the requirement that they conduct face-to-face assessments to identify member needs and permitting remote assessments. The suspensions also provided greater flexibility with respect to eligibility requirements and determinations—which

thereby decreased the likelihood that benefit recipients would be disenrolled while there was a higher risk of COVID-19 spread—by:

- (1) Suspending the requirement that annual eligibility redeterminations occur.
- (2) Suspending the requirements that enrollees be disenrolled for failing to pay their cost share under s. DHS 10.34 (4).
- (3) Suspending the requirements that a care management organization complete at least one annual performance improvement project under s. DHS 10.44 (4) (e).
- (4) Suspending disenrollment provisions in s. DHS 10.45 (2) (b) to provide that care management organizations may not disenroll any enrollee.

Finally, Executive Order 35 suspended the requirement in s. DHS 10.55 (3) that applicants request a fair hearing within 45 days of an adverse action in order to comply with state statutes and permit adversely-affected enrollees more time to submit fair hearing requests due to social distancing and other restrictions brought on by the spread of COVID-19.

The Governor's public health emergency declaration is expired on May 11, 2020, per s. 323.10, Stats., and that expiration will effectively nullify Emergency Order 35. 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 s. DHS 10.31 (4) (b), which requires an applicant for family care benefits to "sign an application in the presence of a representative of the agency."
- Suspend s. DHS 10.32 (4), which requires redeterminations of eligibility for benefits annually or when a change in circumstances occurs.
- Suspend DHS 10.34 (4) (a), which provides that an enrollee who does not contribute to the cost share of the enrollee's care is ineligible for benefits.
- Suspend in part s. DHS 10.44 (2) (e), which requires managed care organizations to conduct face-to-face assessments with enrollees to identify the enrollee's needs.
- Suspend Section DHS 10.44 (4) (e), which requires managed care organizations to conduct at least one performance improvement project annually.
- Suspend in part Section DHS 10.45 (2) (b), which provides that a managed care organization may disenroll an enrollee under circumstances specified in its contract with the department.
- Suspend s. DHS 10.55 (3), which requires applicants to request a fair hearing within 45 days of an adverse action.

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

The current rule includes requirements that will increase the risk of COVID-19 exposure by requiring face-to-face interactions for applications or assessments, and increase the likelihood that benefit recipients will be disenrolled and cease receiving necessary treatment while the risk of COVID-19 spread is elevated. Temporarily suspending these requirements via emergency rulemaking will permit agencies greater flexibility to practice social distancing by reviewing applications and conducting assessments remotely, and further ensure that enrollees—many of whom are at greater risk to contract COVID-19 due to age and pre-existing conditions—continue to receive necessary treatment and are not disenrolled under strict application of existing rules.

Additionally, temporary suspension of the afore-mentioned rules is consistent with 2019 Wis. Act. 185, which permits suspension of certain Medicaid requirements in order to maintain continuous enrollment in compliance with section 6008 (b) (3) of the federal Families First Coronavirus Response Act.

3. Analysis of policy alternative

There are no reasonable alternatives to emergency rulemaking. Governor Evers and Secretary-designee Palm jointly ordered that these above-referenced administrative rules be suspended on May 4, 2020, and that order expired on May 11, 2020.

4. Statutory authority for the rule

a. Explanation of authority to promulgate the proposed rule

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

b. Statute/s that authorize/s the promulgation of the proposed rule

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

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.

Section 46.286 (2) (c), Stats.: A person who is required to contribute to the cost of his or her care but who fails to make the required contributions is ineligible for the family care benefit unless he or she is exempt from the requirement under rules promulgated by the department

Section 46.288, Stats.: The department shall promulgate as rules all of the following:

- (1) Standards for performance by resource centers and for certification of care management organizations, including requirements for maintaining quality assurance and quality improvement.
- (2) Criteria and procedures for determining functional eligibility under s. 46.286 (1) (a), financial eligibility under s. 46.286 (1) (b), and cost sharing under s. 46.286 (2) (a).
- (3) Procedures and standards for procedures for s. 46.287 (2), including time frames for action by a resource center or a care management organization on a contested matter

Section 50.02 (2) (d), Stats.: The department shall promulgate rules that prescribe all of the following:

1. The method by which community-based residential facilities shall make referrals to resource centers or county departments under s. 50.035 (4n) and the method by which residential care apartment complexes shall make referrals to resource centers under s. 50.034 (5n).
2. The time period for nursing homes to provide information to prospective residents under s. 50.04 (2g) (a) and the time period and method by which nursing homes shall make referrals to resource centers under s. 50.04 (2h) (a).

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

Section 46.286 (2), (4) to (7), Stats.

Section 46.287 (2) (a) 1, Stats.

Section 50.02, Stats.

2019 Wis. Act 185 s. 105.

5. Estimates of the amount of time that state employees will spend to develop the 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 rule, including any local governmental units, businesses, economic sectors, or public utility ratepayers who may reasonably be anticipated to be affected by the rule

Aging and Disability Resource Centers (ADRCs), Tribal Aging and Disability Resource Specialists (Tribal ADRS), income maintenance agencies and consortia, managed care organizations (MCOs), WI Department of Administration – Division of Hearings and Appeals, Medicaid enrollees and their families

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

42 CFR 435.907 (f)

- This regulation requires agencies to require that Medicaid applications be signed under penalty of perjury. DHS is seeking flexibility through various authorities (Appendix K, 1135) to permit verbal permission and electronic signatures in lieu of obtaining signatures in person.

42 CFR 435.916 (b)

- This regulation requires that Medicaid eligibility be redetermined at least every 12 months. However, due to the Families First Coronavirus Response Act and the risk in completing in-person eligibility screening, DHS is seeking flexibility through various authorities (Appendix K, D-SPA) to suspend involuntary member disenrollments and when annual eligibility redeterminations cannot be completed on a timely basis.

42 CFR 435.923 (b)

- This regulation permits Medicaid applicants and beneficiaries to authorize another person to perform some functions on their behalf, including signing and completing applications. (*See* 42 CFR 435.907 (f), above.)

42 CFR 438.310; 42 CFR 438.330; 42 CFR 438.358

- These regulations set forth a variety of quality and oversight requirements, including rules related to the completion of performance improvement projects, which is also mandated s. DHS 10.44(2)(e).

42 CFR 438.56

- This regulation describes the manner in which states and their managed care partners may disenroll Medicaid members. However, due to the Families First Coronavirus Response Act's preservation of Medicaid eligibility, DHS is seeking flexibility via Appendix K from involuntarily disenrolling members during the emergency period.

42 CFR 438.408 (f)(2)

- This rule sets a deadline of no more than 120 days in which a member must request a State fair hearing. Wis. Admin Code DHS § 10.55(3) requires that a member must request a fair hearing within 45 days and is not compliant with the aforementioned federal regulation or s. 46.287 (2) (a) 1m., Stats.

7. Anticipated economic impact, locally or state wide

The proposed rule may have a moderate economic impact.

Agency contacts

Mark R. Thompson, Admin. Rules Attorney
Office of Legal Counsel
(608) 266-1279
mark.thompson1@dhs.wisconsin.gov

Jackson Keuler, Admin. Rules Officer
Office of Legal Counsel
(608) 266-0387
jackson.keuler@dhs.wisconsin.gov