

**WISCONSIN DEPARTMENT OF HEALTH SERVICES
PROPOSED ORDER TO ADOPT EMERGENCY RULES**

The Wisconsin Department of Health Services (“the department”) proposes an order to: **repeal** ss. DHS 129.05 (2) (b), 129.06 (1) (e), and 129.09 (5) (a); **repeal and recreate** ss. DHS 129.03 (8), 129.03 (30) (a) (intro), 129.03 (30) (a) 4., 129.03 (37), and 129.06 (1) (a), and 129.11 to .20.

FINDING OF EMERGENCY

Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule. The following rules should be addressed because many facilities that employ certified nursing assistants (CNAs) and feeding assistants are losing these staff because they care for residents who are at a higher risk to contract COVID-19 due to age and pre-existing conditions, which therefore puts staff at increased risk of contracting COVID-19. There is currently a high demand to bring new CNAs into the workforce via “emergency” or expedited training programs, but those programs are not compliant with many of the requirements under ch. DHS 129. If emergency rules are not passed, those emergency training programs will either have to: (1) individually seek waivers or variances, which will add delay and uncertainty regarding training new CNAs; or (2) close, which will result in a supply of CNAs that is inadequate to meet the state’s increased demand.

RULE SUMMARY

Statute interpreted

Sections [146.40](#) (3) and (3g), 146.40 (5), Stats.

Statutory authority

Sections [146.40 \(5\)](#), [227.11 \(2\) \(a\)](#), Stats.

Explanation of agency authority

The department’s authority to promulgate rules is as follows: Section

[146.40 \(5\)](#) Stat.:

(a) The department shall promulgate rules specifying standards for approval in this state of instructional programs and competency evaluation programs for nurse aides. The standards shall include specialized training in providing care to individuals with special needs.

(b) The department shall promulgate rules specifying criteria for acceptance by this state of an instructional program and a competency evaluation program that is certified in another state, including whether the other state grants nurse aide privileges to persons who have completed instruction in an instructional program that is approved under sub. (3) and whether one of the following is true:

1. If the other state certifies instructional programs and competency evaluation programs for nurse aides, the state's requirements are substantially similar, as determined by the department, to certification requirements in this state.
2. If the other state certifies nurse aides, that state's requirements are such that one of the following applies:
 - a. The instructional programs required for attendance by persons receiving certificates are substantially similar, as determined by the department, to

instructional programs approved under sub. (3).

b. The competency evaluation programs required for successful completion by persons receiving certificates are substantially similar, as determined by the department, to competency evaluation programs approved under sub. (3m).

Section 227.11 (2) (a), Stat.:

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 on the agency the 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.

Related statute or rule

Sections [146.40](#) (3) and (3g), Stats.

Plain language analysis

On March 12, 2020, Governor Evers issued Executive Order 72, which, in accordance with s. 323.10, Stat., declared a public health emergency related to COVID-19. Executive Order 72 further designated 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 ordered the suspension of a number of administrative rules, including various sections of ch. DHS 129. Those suspensions aimed to address increased demand for CNAs and feeding assistants due to higher turnover in those positions because their clientele typically posed a higher risk to contract COVID-19. The rule suspensions allowed nursing homes, technical colleges, and private training programs to offer “emergency” or expedited training programs for CNAs to help meet a growing demand.

The Governor’s public health emergency declaration expired on May 11, 2020, per s. 323.10, Stats., and that expiration nullified Emergency Order 21. These emergency training programs do not comport with all of the requirements of ch. DHS 129, and if emergency rules are not promulgated, these programs will either have to: (1) individually seek waivers or variances, which will add delay and uncertainty regarding training new CNAs; or (2) close, which will result

in an inadequate number of CNAs and feeding assistants necessary to meet the state's increased demand to combat the COVID-19 pandemic.

In order to preserve the public peace, health, safety, and welfare under s. 227.24 (1) (a), Stat., the department proposes to suspend or revise certain provisions of DHS 129 to permit greater flexibility for CNA and feeding assistant requirements during the COVID-19 pandemic.

Summary of, and comparison with, existing or proposed federal regulations

Federal conditions of participation for the registry of nurse aides, nurse aide training and testing programs, and training of paid feeding assistants are contained in [42 CFR pp. 483.150 to 483.160](#). These regulations establish conditions and standards for the approval of nurse aide training and competency evaluation programs, for the maintenance and operation of a registry, and for conducting training and testing programs for nurse aides and paid feeding assistants. In response to the COVID-19 pandemic, the Centers for Medicare and Medicaid Services granted blanket waivers to federal requirements for (1) training and certification of nurse aides, and (2) paid feeding assistants.¹

State and federal regulations for registry services and training and testing of CNAs and paid feeding assistants are comparable, however the department previously supplemented these requirements through rulemaking to address therapeutic interventions and non-pharmacological pain control interventions, techniques of restorative nursing, client rights and reporting abuse or neglect of a client or misappropriation of a client's property.²

Comparison with rules in adjacent states

Illinois:

Illinois adopted significant portions of the federal regulation including the standards for the denial, suspension and revocation of program approval in 77 Admin Code 395, Long-Term Care Assistants and Aides Training Programs Code. Illinois specifies a comprehensive list of topics that must be addressed in any approved program including patient rights, communication, psychological needs of patient and family, hand washing, body mechanics, basic anatomy, nutrition, etc. Each set of topics includes course objectives and proficiency measures. On March 24, 2020, Illinois Governor J.B. Pritzker issued Executive Order 2020-12 which made changes to the requirements for CNAs due to COVID-19, and the state department of public health filed emergency rules to make changes to the health care worker background check code in order to implement the provisions of Executive Order 2020-12.

Iowa:

Iowa Code Chapter [81](#) – 16 Nurse Aide Requirements and Training and Testing Program closely mirrors federal requirements by including standards for denial, suspension and revocation of program approval. Like Illinois, Iowa code contains an extensive list of topics that must be included in any approved training program including bathing, dressing, toileting, assistance with eating, skin care, transfers, responding to behaviors, restorative care and avoiding the need for restraints. On March 22, 2020, Iowa Governor Kim Reynolds issued an executive order allowing licensing boards to grant emergency licenses to applicants.

Michigan:

Michigan has no state rule regarding certified nurse aide training programs or maintenance of a registry and relies solely on federal regulations.

¹ See CENTERS FOR MEDICARE AND MEDICAID SERVICES, "COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers," at 16, 19, available at <https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf>.

² See CR 16-088, which became effective on October 1, 2017, available at https://docs.legis.wisconsin.gov/code/chr/all/cr_16_088.

Minnesota:

Minnesota has no state rule regarding certified nurse aide training programs or maintenance of a registry and relies solely on federal regulations.

Summary of factual data and analytical methodologies

The department considered criteria it adopted and that were approved by the Wisconsin Small Business Regulatory Review Board to determine whether proposed rules have a significant economic impact on a substantial number of small businesses. A proposed rule is understood to have an economic impact on a substantial number of small businesses if at least 10% of the businesses affected by the proposed rules are small businesses and if operating expenditures, including annualized capital expenditures, increase by more than the prior year's consumer price index, or revenues are reduced by more than the prior year's consumer price index. For the purposes of this rulemaking, 2020 is the index year. From February 2019 to February 2020, the Consumer Price Index for All Urban Consumers (CPI-U) rose 2.3 percent, a smaller increase than the 2.5-percent increase for the year ending January 2020.

Section [227.114 \(1\) \(a\)](#), Stat., defines "small business" as a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employs 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000.

The Department of Health Services / Division of Quality Assurance Databases – Nurse Aides – Training Options databases that contain demographic, licensing, program, and compliance history of nurse aide training programs and certified nurse aides in Wisconsin.

Analysis and supporting documents used to determine effect on small business Nurse aide training programs are not defined by the North American Industry Classification System (NAICS), as most of these programs operate within the Wisconsin Technical College System or within a healthcare facility. Specific revenue, expense, and staffing data is therefore not available from this source. The department instead relies on data obtained through the Department of Health Services/Division of Quality Assurance Databases – Nurse Aides - Training Options.

As of June 12, 2020, 119 nurse aide training programs are operated by various entity types within state. The type of entity and number of programs is provided below:

- Nursing homes - 26
- Wisconsin Technical Colleges - 56
- High schools - 4
- Home health agency - 1
- Hospitals - 8
- Facilities serving people with developmental disabilities - 4
- Universities - 2
- Private - 17
- USDA Forest Service - 1

Based on a review of department licensing data, including, financial reports submitted by the entities, Medicaid reimbursement data, number of beds and whether the entity is a part of a larger healthcare organization, the department has determined that the affected nursing homes, hospitals and facilities serving people with developmental disabilities are not small businesses as defined by s. [227.114 \(1\) \(a\)](#), Stat. The technical colleges, high schools, universities and the USDA Forest Service also do not meet the definition of a small business.

Effect on small business

Based on the foregoing analysis, the emergency rules are anticipated to have little to no economic impact on small businesses.

Agency contact person

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Statement on quality of agency data

The data sources used to draft the rules and analyses are accurate, reliable and objective and are listed in the Summary of Factual Data and Analytical Methodologies section of this rule order.

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 notice of public hearing and deadline for submitting comments will be published in the Wisconsin Administrative Register and to the department's website, at <https://www.dhs.wisconsin.gov/rules/permanent.htm>. Comments may also be submitted through the Wisconsin Administrative Rules Website, at: <https://docs.legis.wisconsin.gov/code/chr/active>.

RULE TEXT

SECTION 1. DHS 129.03 (8) is repealed and recreated to read:

DHS 129.03 (8). "Clinical setting" means the equivalent of "supervised practical training" under 42 CFR 483.152(a)(3).

SECTION 2. DHS 129.03 (30) (a) (intro) is repealed and recreated to read:

DHS 129.03 (30) (a). "Nurse aide" means a person, regardless of the person's title, who provides routine client-related services. "Nurse aide" includes any of the following:

SECTION 3. DHS 129.03 (30) (a) 4. is repealed and recreated to read:

DHS 129.03 (30) (a) 4. Any person employed to provide nursing or nursing-related services or employed within the last 24 months as a nurse aide.

SECTION 4. DHS 129.03 (37) is repealed and recreated to read:

DHS 129.03 (37) "Primary instructor" means a registered nurse licensed to practice in Wisconsin who has experience working as a registered nurse.

SECTION 5. DHS 129.05 (2) (b) is repealed.

SECTION 6. DHS 129.06 (1) (a) is repealed and recreated to read:

DHS 129.06 (1) (a). The primary instructor for a training program shall be a registered nurse licensed to practice in Wisconsin, who has experience working as a registered nurse. -

SECTION 7. DHS 129.06 (1) (e) is repealed.

SECTION 8. DHS 129.09 (5) (a) is repealed.

SECTION 9. DHS 129.11 to .20 is repealed and recreated to read:

DHS 129.11. Facilities may use non-nurse aides to provide feeding assistance to individuals who do not have complications with eating or swallowing.

SECTION 10. EFFECTIVE DATE. The rules contained in this order shall take effect as emergency rules upon publication in the official state newspaper and will remain in effect as provided in s. 227.24.

Wisconsin Department of Health Services

Dated: 08/10/2020



Andrea Palm, Secretary-designee

SEAL: