

WISCONSIN DEPARTMENT OF HEALTH SERVICES PROPOSED ORDER TO ADOPT EMERGENCY RULES

The Wisconsin Department of Health Services (“the department”) proposes an order to: **amend** ss. DHS 10.31 (4) (b) and 10.44 (2) (e); and **repeal** ss. DHS 10.32 (4), 10.34 (4) (a) and 10.45 (2) (b).

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, 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.

RULE SUMMARY

Statute interpreted

Not applicable

Statutory authority

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).

2019 Wis. Act 185 s. 105 (1):

(1) Enhanced federal medical assistance percentage. If the federal government provides an enhanced federal medical assistance percentage during an emergency period declared in response to the novel coronavirus pandemic, the department of health services may do any of the following during the period to which the enhanced federal medical assistance percentage applies in order to satisfy criteria to qualify for the enhanced federal medical assistance percentage:

(a) Suspend the requirement to comply with the premium requirements under s. 49.45 (23b) (b) 2. and (c).

(b) Suspend the requirement to comply with the health risk assessment requirement under s. 49.45 (23b) (b) 3.

(c) Delay implementation of the community engagement requirement under s. 49.45 (23b) (b) 1. until the date that is 30 days after either the day the federal government has approved the community engagement implementation plan or the last day of the calendar quarter in which the last day of the emergency period under 42 USC 1320b-5 (g) (1) that is declared due to the novel coronavirus pandemic occurs, whichever is later.

(d) Notwithstanding any requirement under subch. IV of ch. 49 to disenroll an individual to the contrary, maintain continuous enrollment in compliance with section 6008 (b) (3) of the federal Families First Coronavirus Response Act, P.L. 116-127.

Explanation of agency authority

The department's authority to promulgate the emergency rules to maintain continuous Medicaid eligibility for persons enrolled in Medicaid is explicitly granted by the legislature in 2019 Wis. Act 185 s. 105 (1) (a)-(d). The department's authority to promulgate the emergency rules to protect against and control the spread of communicable diseases is explicitly granted by the legislature in Section 252.02 (4) and (6), Stats.

Related statute or rule

The following statutes or rules directly relate to gaining increased federal funding made available under s. 6008 of the Families First Coronavirus Response Act (“FFCRA”), P.L. 116-127, and implementing allowable program flexibilities to protect against and control the spread of communicable diseases:

Section 1915(c) of the Social Security Act of 1935, as amended

Section 6008 (b) (3) of the FFCRA

42 CFR 435.907(f)

42 CFR 435.916(b)

42 CFR 435.923(b)

42 CFR 438.56

42 CFR 441.301(c)(1)-(2)

Section 46.286 (2) (c), Stats.

Section 46.288, Stats.

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

Section DHS 145.02

Section DHS 145.05 (4)

Section DHS 145.06 (1)

2019 Act 185 s. 105 (1) (a)-(d)

Plain language analysis

The intent of the emergency rule is to qualify for increased federal funding under s. 6008 of the FFCRA and grant allowable program flexibilities to protect against and control the spread of communicable diseases by altering Family Care program signature requirements and suspending certain member eligibility determinations and disenrollments.

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

In order to qualify for increased federal funding under s. 6008 of the FFCRA, states are required to maintain continuous Medicaid eligibility for persons enrolled in Medicaid, unless the person leaves the state or requests disenrollment.

Additional Family Care program flexibilities implemented to protect against and control the spread of communicable diseases have been explicitly granted by the Centers for Medicare & Medicaid Services through the approval of the Appendix K: Emergency Preparedness and Response and COVID-19 Addendum to the 1915(c) Family Care program waiver. The Family Care program is unique to Wisconsin. Adjacent states administer their own versions of home and community-based services programs through 1915(c) waivers and have received similar flexibilities through Appendix K: Emergency Preparedness and Response and COVID-19 Addenda.

Comparison with rules in adjacent states

Illinois:

Illinois will similarly need to maintain continuous Medicaid eligibility for persons enrolled in Medicaid in order to gain increased federal funding made available under s. 6008 of the FFCRA. Additionally, it has received federal authority to allow for electronic signatures and virtual/remote meetings in lieu of face-to-face assessment interviews through a 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum.

Iowa:

Iowa will similarly need to maintain continuous Medicaid eligibility for persons enrolled in Medicaid in order to gain increased federal funding made available under s. 6008 of the FFCRA. Additionally, it has received federal authority to allow for electronic signatures and virtual/remote meetings in lieu of face-to-face assessment interviews through a 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum.

Michigan:

Michigan will similarly need to maintain continuous Medicaid eligibility for persons enrolled in Medicaid in order to gain increased federal funding made available under s. 6008 of the FFCRA. Additionally, it has received federal authority to allow for electronic signatures and virtual/remote meetings in lieu of face-to-face assessment interviews through a 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum.

Minnesota:

Minnesota will similarly need to maintain continuous Medicaid eligibility for persons enrolled in Medicaid in order to gain increased federal funding made available under s. 6008 of the FFCRA. Additionally, it has received federal authority to allow for virtual/remote meetings in lieu of face-to-face assessment interviews through a 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum.

Summary of factual data and analytical methodologies

The Department relied upon requirements under s. 227.24, Stats., and information provided to the Department by the Legislative Reference Bureau.

Analysis and supporting documents used to determine effect on small business

The emergency rule is not anticipated to have an effect on small business. See the associated Fiscal Estimate & Economic Impact Analysis.

Effect on small business

The emergency rule is not anticipated to have an effect on small business.

Agency contact person

Laura Brauer, DHSAdminRules@dhs.wisconsin.gov, (608) 266-5368.

Statement on quality of agency data

See “summary of factual data and analytical methodologies” section above.

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. Section DHS 10.31 (4) (b) is amended to read:

DHS 10.31 (4) (b) Signing the application. The applicant or the applicant’s legal guardian, authorized representative or, where the applicant is incapacitated, someone acting responsibly for the applicant, shall sign each application form, ~~in the presence of a representative of the agency. The signatures of 2 witnesses are required when the applicant signs the application with a mark~~ The signature may be provided using electronic methods identified by the department as constituting a signature.

SECTION 2. Section DHS 10.32 (4) is repealed.

SECTION 3. Section DHS 10.34 (4) (a) is repealed.

SECTION 4. Section DHS 10.44 (2) (e) is amended to read:

DHS 10.44 (2) (e) The CMO shall use assessment protocols that include ~~a face-to-face~~ an interview with the enrollee and that comprehensively assess and identify all of the following:

SECTION 5. Section DHS 10.45 (2) (b) is repealed.

SECTION 6. EFFECTIVE DATES. This rule shall take effect upon publication in the official state newspaper, as provided in s. 227.24 (1) (c), Stats. Rules shall remain in effect as follows:

Sections 1 and 4 of this rule order shall remain in effect until the end of the time period provided in ss. 227.24 (1) (c) and (2), Stats., or until the termination of the Appendix K: Emergency Preparedness and Response and COVID-19 Addendum to the 1915 (c) Family Care program waiver (anticipated to end on March 1, 2021), whichever occurs sooner.

Sections 2, 3, and 5 of this rule order shall remain in effect until the end of the time period provided in section ss. 227.24 (1) (c) and (2), Stats., or until the first day of the calendar month following the end of the quarter in which the emergency period defined in s. 1135 (g) (1) (B) of the Social Security Act, 42 U.S.C. s. 1320b-5 (g) (1) (B), ends, whichever occurs sooner.

Wisconsin Department of Health Services

Dated: _____

Andrea Palm, Secretary-designee

SEAL: