

**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).

The Governor approved the Statement of Scope for this rule, SS 062-21, on July 1, 2021. The Statement of Scope was published in Administrative Register 787A1 on July 6, 2021, and was approved by the Secretary of the Department on July 20, 2021. The Rule was approved by the Governor on July 29, 2021.

FINDING OF EMERGENCY

Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule. 2019 Wis. Act 185 s. 105 (1) (d) permits the state, in order to qualify for increased federal funding under s. 6008 of the Families First Coronavirus Response Act (“the FFCRA”), Pub. L. No. 116-127, to maintain continuous Medicaid eligibility for persons enrolled in Medicaid (unless the person leaves the state or requests disenrollment) during the federal emergency period declared in response to the COVID-19 pandemic. Strict compliance with eligibility redetermination, payment of cost share, and disenrollment requirements might result in Medicaid enrollees being involuntarily disenrolled from receiving financial assistance for necessary long-term care and treatment. Disenrollment under these provisions would be inconsistent with the requirements of the FFCRA—which would result in the loss of enhanced federal funding of about \$150 million per quarter.

RULE SUMMARY

Statute interpreted

Not applicable

Statutory authority

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

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.

... (10) LEGISLATIVE OVERSIGHT OF THE MEDICAL ASSISTANCE PROGRAM.

- (a) Section 20.940 does not apply to a request for a waiver, amendment to a waiver, or other federal approval from the department of health services submitted to the federal department of health and human services during the public health emergency declared under 42 USC 247d by the secretary of the federal department of health and human services on January 31, 2020, in response to the 2019 novel coronavirus, only if the request is any of the following, relating to the Medical Assistance program:

... 17. Allowing flexibility for submission of electronic signatures on behalf of a Medical Assistance recipient by application assistors if a signature cannot be captured in person

... 37. Relating to the home and community-based waiver programs of Family Care, IRIS, and Children's Long-Term Supports, any of the following:

... a. Allowing all waiver services and administrative requirements that that can be provided with the same functional equivalency of face-to-face services to occur remotely.

... zb. Adding a verbal and electronic method to signing required documents.

... zc. Allowing the option to conduct evaluations, assessments, and person-centered service planning meetings virtually or remotely in lieu of face-to-face meetings.

... zs. Allowing the suspension of involuntary disenrollments.

Explanation of agency authority

The department's authority to promulgate emergency rules to maintain continuous Medicaid eligibility for persons enrolled in Medicaid is explicitly granted by the legislature in 2019 Wis. Act 185 ("Act 185") s. 105 (1) (a) to (d) and (10) (a).

Related statute or rule

This rule succeeds EmR2040, which was effective through July 20, 2021. The Department is also promulgating a permanent rule in light of the ongoing need to suspend rule provisions to comply with s. 6008 of the FFCRA.

The following statutes or rules directly relate to gaining increased federal funding made available under s. 6008 of the FFCRA:

- Section 1135(g)(1)(B) of the Social Security Act of 1935, as amended
- Section 6008 (b) (3) of the Families First Coronavirus Response Act, P.L. 116-127
- Section 49.46 (1), Stats.
- Section 49.46 (1) (c) and (cg), Stats.
- Section 49.47 (4) (b) and (c) 1., Stats.
- Section 49.47 (4) (c) 2., Stats.
- Section 49.688, Stats.
- Section 49.471, Stats.
- Section 49.472 (3), Stats.
- Section 49.78 (11), Stats.
- Section 49.82 (2), Stats.
- Section 49.84, Stats.
- 2019 Act 185 s. 105 (1) (a)-(d)

The following statutes or rules directly relate to complying with the federally-approved program changes made under the Family Care 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum:

- Section 46.286 (2), (4) to (7), Stats.
- Section 46.287 (2) (a) 1., Stats.
- Section 50.02, Stats.
- 2019 Act 185 s. 105 (10) (a) 17. and 37. a., zb., zc. and zs.

Plain language analysis

The intent of the emergency rule is to take action permitted under s. 105 (1) of Act 185, and thereby qualify for increased federal funding under s. 6008 of the FFCRA. Section 6008 of the FFCRA provides a temporary 6.2 percentage point federal medical assistance percentage ("FMAP") increase to each state that maintains continuous eligibility for persons enrolled in Medicaid (unless the person leaves the state or requests disenrollment) during the federal emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320-5(g), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic. The increased FMAP provided to the state under the FFCRA amounts to approximately \$150 million per quarter.

On April 17, 2020, Act 185 became effective. Section 105 (1) of Act 185 provided that, in order to comply with section 6008 of the FFCRA and obtain an enhanced medical assistance percentage from the federal government, the state may suspend certain Medicaid requirements and maintain continuous Medicaid eligibility for those who were enrolled on March 18, 2020 or later, unless that person requested disenrollment or lost state residency.

The first federal emergency declaration took effect in January 2020.¹ That declaration has been renewed several times, and the public health emergency remains in effect through October 2021.² In a letter to governors, the United States Secretary of Health and Human Services represented that the federal public health emergency will likely remain in place for the entirety of 2021.³ It is possible that the federal emergency could be extended into 2022.

Several measures have been taken in accordance with Act 185 in order to comply with s. 6008 of FFCRA. In May 2020, Governor Evers and then-Department-Secretary-designee Palm issued Emergency Order 35, which ordered the suspension of a number of administrative rules which contained requirements that could result in Medicaid recipients being disenrolled during the federal public health emergency. The Governor's public health emergency subsequently expired, which effectively nullified Emergency Order 35. Following the expiration of Emergency Order 35, the Department, in accordance with s. 227.24, Stats., promulgated emergency rule 2040 ("EmR2040"), which suspended provisions in ch. DHS 10 in order to comply with s. 6008 of FFCRA. EmR2040 was extended for the maximum 120 days allowed under s. 227.24 (2), Stats., and expired on July 20, 2021.

In order to continue complying with section 6008 of the FFCRA and to receive approximately \$150 million in federal funding per quarter, the Department has determined that, in light of the ongoing need to suspend rule provisions to comply with s. 6008 of the FFCRA, permanent rules that supplant the emergency rule currently in effect and temporarily suspend certain Medicaid eligibility provisions are necessary so that the Department maintains continuous enrollment in Medicaid during the declared emergency period. The permanent rule will create sunset provisions that seek to amend or create provisions in ch. DHS 10 specific to maintaining continuous enrollment, and then repeal those provisions after the end of the federal public health emergency.

Additionally, the rule seeks to align with federally-approved program changes permitted under s. 105 (10) (a) of Act 185, which authorized the Medicaid program to amend program waivers in response to the COVID-19 pandemic. The Family Care program operates under concurrent 1915(b) and 1915(c) waivers, as described by section 1915 of the Social Security Act. *See* 42 USC 1396n(b)-(c). Based on s. 105 (10) (a) of Act 185, the Department requested, and the Centers for Medicare and Medicaid Services approved, an amendment to the Family Care 1915(c) waiver. This waiver amendment, known as Appendix K: Emergency Preparedness and Response and COVID-19 Addendum, is in effect from March 1, 2020 to no later than six months after the expiration of the federal public health emergency.

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.

¹ A copy of the original Determination that a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

² A copy of the July 2021 Renewal of Determination That a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-19July2021.aspx>.

³ A copy of this letter is available at <https://ccf.georgetown.edu/wp-content/uploads/2021/01/Public-Health-Emergency-Message-to-Governors.pdf>

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, DHS/DMSAdminRules@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. EFFECTIVEDATES. 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 whichever of the following occurs the earliest:

1. The end of the time period provided in ss. 227.24 (1) (c) and (2), Stats.
2. The termination of the Appendix K: Emergency Preparedness and Response and COVID-19 Addendum to the 1915 (c) Family Care program waiver.
3. A permanent rule for Statement of Scope SS 062-21 taking effect under s. 227.22, Stats., following publication under s. 227.21, Stats.

Sections 2, 3, and 5 of this rule order shall remain in effect until whichever of the following occurs the earliest:

1. The end of the time period provided in section ss. 227.24 (1) (c) and (2), Stats.
2. 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) and declared in relation to the COVID-19 pandemic ends.
3. A permanent rule for Statement of Scope SS 062-21 taking effect under s. 227.22, Stats., following publication under s. 227.21, Stats.

Wisconsin Department of Health Services

Dated: _____

Karen Timberlake, Secretary-designee

SEAL: