

## **Report From Agency**

### **ADMINISTRATIVE RULES REPORT TO LEGISLATURE CLEARINGHOUSE RULE CR08-098**

**By the Department of Health Services relating to ch. DHS 12, Caregiver Background Checks**

#### **Basis and Purpose of Proposed Rule**

Section 50.065 (2m) (d), Stats., requires the Department to promulgate rules to specify crimes for which an entity must disclose to a client or the client's guardian, a conviction of a caregiver who is assigned to provide personal care services to the client in the client's personal residence and to specify who is a "substitute caregiver".

The proposed rule includes a definition of the term "substitute caregiver." The rule also includes a list of crimes that require disclosure related to caregivers providing personal care services, including all of the crimes currently listed under s. 50.065 (1) (e), Stats., already used by entities, to determine a person's eligibility to work for the entity as a caregiver, and the following additional crimes:

- Theft
- Robbery
- Financial card transactions crimes
- Identity theft
- Drug crimes

#### **Responses to Legislative Council Rules Clearinghouse Recommendations**

The Department accepted the comments made by the Legislative Council Rules Clearinghouse and modified the proposed rule where suggested.

#### **Final Regulatory Flexibility Analysis**

The proposed rule will not have a fiscal impact on small businesses, independent of the costs already imposed by the requirements under s. 50.065 (2m), Stats., that entities conduct background checks, including criminal history checks, on individuals the entity assigns to provide personal care services in a client's residence and disclose the results to the client or the client's guardian.

#### **Changes to the Analysis or Fiscal Estimate**

##### **Analysis**

The Department amended the analysis to clarify that the list of crimes that require disclosure include all of the crimes currently listed under s. 50.065 (1) (e), Stats., that are already used by entities, including entities serving persons under the age of 18, to determine an individual's eligibility to work for the entity as a caregiver, along with additional crimes.

### **Fiscal Estimate**

No changes were made to the fiscal estimate.

### **Public Hearing Summary**

The Department began accepting public comment on the proposed rule on November 25, 2008 via the Wisconsin Administrative Rules Website. One public hearing was held in Madison on January 6, 2009. Six individuals attending the hearing. The hearing record closed on January 16, 2009.

### **List of Public Hearing Attendees and Commenters**

The following is a complete list of the persons who attended the public hearing or submitted comments on the proposed rule, the position taken by the commenter and whether or not the individual provided written or oral comments.

<b>Name and Address</b>	<b>Position Taken (Support or Opposed)</b>	<b>Action (Oral or Written)</b>
1. Burton A. Wagner 22 E. Mifflin St. Madison, WI 53703	Opposed	Oral and Written
2. Amy Mlot Society's Assets, Inc. 5200 Washington Ave. #225 Racine, WI 53406	Opposed	Oral
3. Laurie Hintz 336 W. Wabash Waukesha, WI 53186	None taken.	Observer
4. Ruth Ann Zwiefelhofer Society's Assets, Inc. 5200 Washington Ave. # 225 Racine, WI 53406	Opposed	Oral
5. John Hendrick Coalition of Wisconsin Aging Groups 2850 Dairy Drive, Suite 100 Madison, WI 53718	Support	Oral
6. Dan Hayes 16 N. Carroll St, Suite 800 Madison, WI 53703	None taken.	Observer
7. Forbes McIntosh, Government Policy Solutions for: LuAnne Barnet, President Residential Services Association (RSA) of Wisconsin Bob Glowacki, President Community Alliance of Providers of Wisconsin (CAPOW)	Opposed	Written

### **Public Comments and Department Responses**

The number(s) following each comment corresponds to the number assigned to the individual listed in the Public Hearing Attendees and Commenters section of this document.

<b>Rule Provision</b>	<b>Public Comment</b>	<b>Department Response</b>
General	<p>There has been a significant financial impact on the agency to implement the new rule, approximately \$ 1,010,000 annually. The work involves a huge man power commitment while staff is still trying to recruit, hire and retain staff. 2, 4</p>	<p>The proposed rule does not have a fiscal impact on businesses independent of the costs imposed by the requirements established under s. 50.065 (2m), Stats., as created by 2007 Act 172, for entities to conduct background checks on individuals the entity assigns to provide personal care services in a client's residence and disclose the results to the client or the client's guardian. Additional costs individual entities may incur are directly related to the new statutory requirements.</p>
DHS 12.115	<p>Recommend the department limit notification of convictions that do not relate to physical harm or immediate jeopardy to an established time period from the date of conviction.</p> <p>Individuals who have committed less serious crimes should not be punished for the remainder of their lives. If a person has been convicted of a less serious crime and has not had another similar criminal conviction within 5 years, then notification should not be required.</p> <p>The Department should limit notification of less serious criminal convictions where an individual has established rehabilitation with the Department of Health Services. Individuals who have been convicted of less serious crimes should not be punished for the remainder of their lives, if that individual has met Department requirements establishing rehabilitation. If a person who has been convicted of a less serious crime; has not had another similar criminal conviction within 3 years; and has received DHS certification of being rehabilitated, then notification should not be required. The commenter identified theft, robbery, financial card transactions crimes, identity theft, leaving a child unattended in a child care vehicle, possession of a controlled substance, acquiring a controlled substance by misrepresentation or</p>	<p>The Department did not limit the disclosure requirement for crimes concerning theft, robbery, financial card transactions crimes and identity theft. Placing a person who has a conviction of one of these crimes into the client's home could place the client at risk for theft of their property. Lesser financial crimes, such as retail theft (shoplifting), are not included in the list of crimes to be disclosed.</p> <p>The Department amended DHS 12.115 to require disclosure of a conviction if the caregiver background check shows the person was convicted of an offense pursuant to s. Wisconsin Statute 961.41 (3g) (possession or attempt to possess a controlled substance) within 5 years before the information was obtained. The disclosure requirement for s. 961.41 (3g) is in effect for 5 years from the date of conviction.</p> <p>The Department did not include a time limit for disclosing the remaining drug related convictions or leaving a child unattended in a child care vehicle. The remaining drug offenses include the manufacture, distribution or delivery of a controlled substance, acquiring a controlled substance by misrepresentation or forgery or making, distributing or possessing material to</p>

Rule Provision	Public Comment	Department Response
	<p>forgery or making, distributing or possessing material to reproduce any drug as less serious crimes. 7</p>	<p>reproduce any drug. Placing an individual with a conviction of any of these offenses in a client's home could place the client at risk for loss of their prescription medication and personal property or place minors at risk for neglect.</p> <p>It is important to emphasize that conviction of a crime relating to theft, robbery, financial card transactions, identity theft or a drug related crime requires the entity to disclose the conviction to the client but does not bar the individual from employment except for certain persons providing foster care except for certain persons providing foster care.</p>
<p>DHS 12.115</p>	<p>The Coalition of Wisconsin Aging Groups supports the disclosure of financial crimes. Recent studies estimate that approximately 3.5 % of Wisconsin's elderly are victims of financial exploitation. Financial exploitation is a large and growing crime. The conviction of any financial crime should be reported. The perpetrators are family and non-family members. People in their homes are more vulnerable. Although CWAG's primary concern is not with drug crimes, often financial crimes are motivated by drug use. Drug use 10 years ago may not be as relevant. It should be remembered that the proposed list of convictions does not bar employment but only requires that the entity disclose the conviction. 6</p>	<p>No response necessary.</p>
<p>DHS 12.115</p>	<p>Commenters expressed concern that drug convictions are included in the list of convictions that must be disclosed. Currently conviction of these crimes bars employment only with children. Commenters state there is no reason that convictions of drug crimes should apply to adults. Many times these crimes were committed when the individual was young, 18 or 19 years old, and now, at age 50, the convictions must be disclosed. Commenters recommend a time limit for disclosure be placed on the conviction. 1, 2.</p>	<p>The Department amended DHS 12.115 to require disclosure of a conviction if the caregiver background checks show the person was convicted of s. Wisconsin Statute 961.41 (3g) (possession or attempt to possess a controlled substance) within 5 years before the information was obtained. The disclosure requirement for s. 961.41 (3g) is in effect for 5 years from the date of conviction.</p> <p>The Department did not include a time limit for disclosing convictions of the remaining drug related offenses listed under Table DHS</p>

Rule Provision	Public Comment	Department Response
		<p>12.115. The remaining drug offenses include the manufacture, distribution or delivery of a controlled substance, acquiring a controlled substance by misrepresentation or forgery or making, distributing or possessing material to reproduce any drug. Placing an individual with a conviction of any of these offenses in a client’s home could place the client at risk for loss of their prescription medication and personal property.</p> <p>It is important to emphasize that conviction of a crime relating to theft, robbery, financial card transactions, identity theft or a drug-related crime requires the entity to disclose the conviction to the client but does not bar the individual from employment except for certain persons providing foster care.</p>
DHS 12.115	<p>Recommend exempting multi-family dwellings from definition of “Residence”. A prime directive in the care of individuals with developmental disabilities is to provide care in the least restrictive setting and to promote independence. Toward that end, many providers have worked with individuals and guardians toward multi-family rental agreements in independent apartment buildings with roommates. These dwellings are not Adult Family Homes, Community-Based Residential Facilities or Residential Care Apartment Complexes. These are independent dwellings with one or more roommates that are concentrated near similar dwellings so that service providers can be provided in an efficient and cost effective manner. Under this law one individual will have veto power over the continued employment or new employment of a personal care worker even if others approve. This would be unfair to the employee and unfair to the other individuals that may have built a strong relationship with the personal care worker. 7</p>	<p>The Department did not exempt from disclosure the convictions of caregivers providing personal care services to residents of multi-family dwellings. If the Department were to make an exemption, persons living in multi-family dwellings would be denied the protection of the law given to their counterparts living in single-family dwellings. The proposed rule requires that entities disclose to each client or to each client’s guardian a conviction of a caregiver who is assigned to provide personal care services. The client or client’s guardian would decide whether they would agree to receive services from the caregiver. One client would not make this decision for another client.</p> <p>The Department does not require entities that provide personal care services in facilities to provide background disclosure to persons admitted to the following regulated facilities:</p> <ul style="list-style-type: none"> <li>○ Nursing home [s. 50.01(3)]</li> <li>○ Community based residential facility [s. 50.01(1g)]</li> <li>○ Adult family home [s. 50.01(1)]</li> <li>○ Residential care apartment complex [s. 50.01(1d)]</li> </ul>

<b>Rule Provision</b>	<b>Public Comment</b>	<b>Department Response</b>