

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

The Wisconsin Department of Health Services (“the Department”) proposes an order to: **amend** DHS 10.41 (2); and **create** DHS 10.13 (16g) and (16r), 101.03 (51p) and (51t), 105.16 (1m), 105.17 (1g) (cm), 105.19 (7m), 106.03 (2m), 107.02 (1) (am), relating to electronic visit verification requirements for certain Medical Assistance services.

The Governor approved the Statement of Scope for this rule, SS 081-22, on October 6, 2022. The Statement of Scope was published in Administrative Register on October 10, 2022 and was approved by the Secretary of the Department on January 18, 2023. The Emergency Rule was approved by the Governor on April 20, 2023.

FINDING OF EMERGENCY

In order to comply with federal law, Wisconsin must establish a requirement that personal care and home health agencies utilize an electronic visit verification (“EVV”) system. The Department has established an EVV hard launch date of May 1, 2023. New administrative rules are necessary to implement and enforce these requirements, but it will be impossible to promulgate permanent rules that comply with all of the requirements of ch. 227, Stats., by that launch date. If Wisconsin does not implement this change, the state will be out of compliance with federal laws and regulations, and could be subject to reduction of its federal medical assistance percentage for home health care services as provided in 42 USC 1396b(l)(1)(A) and (B). Thus, preservation of the public welfare—namely the department's compliance with federal law—necessitates putting an emergency rule into effect prior to the time a permanent rule would take effect if the agency complied with all of the statutory procedures under ch. 227, Stats.

RULE SUMMARY

Statute interpreted: Section 49.45 (2) (a) 7., Stats.

Statutory authority

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

Section 46.288, Stats.

Section 49.45 (1), (2) (a) 1. and 2., 11. a. and b., 12. a. and b., 13., (b) 4., (3) (f) 2., and (10), Stats.

Section 49.46 (2) (b), Stats.

Section 49.47 (6) (a), Stats.

Section 49.471 (12) (a) 1., Stats.

Section 227.11 (2) (a), Stats.

Section 227.24 (1) (a), Stats.

Explanation of agency authority

Section 46.288, Stats., authorizes the department to create rules for certification of care management organizations, including requirements for maintaining quality assurance and quality improvement.

Section 49.45, Stats., directs the department to administer medical assistance (“MA”) and rehabilitative or other services in order to “provide appropriate health care for eligible persons and obtain the most

benefits available under Title XIX of the federal social security act” and “help eligible individuals and families retain capability or independence or self-care.” Subsection (2) (a) of the statute directs the department to oversee the state MA program, which includes doing all of the following:

- (1) Exercising responsibility relating to fiscal matters and eligibility for benefits under ss. 49.46 to 49.471, Stats..
- (2) “[C]ooperat[ing] with federal authorities for the purpose of providing assistance and services under Title XIX to obtain the best financial reimbursement available to the state from federal funds.”
- (3) Establishing criteria for certification of MA providers, certifying MA providers, and promulgating rules related to certification.
- (4) Decertifying or restricting MA providers who, after reasonable notice and opportunity for hearing, the department determines have violated federal or state MA laws or regulations, and promulgating rules to implement those processes.
- (5) Setting forth conditions for provider participation and reimbursement and impose additional sanctions for noncompliance with terms or provider agreements or certification criteria.

Subsection (2) (b) of the statute further authorizes the department to audit claims filed by an MA provider and to request review of any medical records of individuals who received benefits under MA. Subsection (3) of the statute, relating to payment, requires that providers of MA maintain records as required by the department for verification of provider claims for reimbursement, and further authorizes the department to deny claims for reimbursement that cannot be verified, and to recover “the full value of any claim” if an audit determines that the actual provision of services cannot be verified or that the service was not covered. Subsection (10) of the statute authorizes the department to “promulgate such rules as are consistent with its duties in administering medical assistance” as detailed in the above-cited provisions of s. 49.45, Stats.

Section 49.46 (2) (b), Stats., allows the department to audit and pay certified Medicaid providers on behalf of recipients for specifically enumerated services. This authority is relevant to the proposed rules because claims that are not matched to requisite EVV data will be denied. Services include:

6. The following services that, other than under subd. 6. f., fm., k., and Lr., are prescribed or ordered by a provider acting within the scope of the provider’s practice under statutes, rules, or regulations that govern the provider’s practice:
 - b. Physical and occupational therapy.
 - c. Speech, hearing and language disorder services.
 - dm. Subject to the requirements under s. 49.45 (9r), durable medical equipment that is considered complex rehabilitation technology, excluding speech generating devices.
 - g. Nursing services as defined in rules that the department shall promulgate.
 - j. Personal care services, subject to the limitation under s. 49.45 (42).
 - m. Respiratory care services for ventilator–dependent individuals.

8. Home or community-based services, if provided under s. 46.275, 46.277, 46.278, 46.2785, 46.99, or under the family care benefit if a waiver is in effect under s. 46.281 (1d), or under the disabled children's long-term support program, as defined in s. 46.011 (1g).
9. Case management services, as specified under s. 49.45 (24) or (25).
18. Care coordination, as specified under s. 49.45 (25g).
20. Subject to s. 49.45 (24j), any additional services, as determined by the department, that are targeted to a population enrolled in a medical home initiative under s. 49.45 (24j).

Section 49.47 (6) (a), Stats., summarizes the department's authority to audit and pay charges to providers for medical assistance on behalf of all Medicaid beneficiaries. The department will apply this authority in to enforce the proposed EVV rules by denying claims that are not matched to the requisite EVV data.

Section 49.471, includes provisions for BadgerCare Plus related to eligibility criteria. Subsection (12) of the statute authorizes the "department to promulgate any rules necessary for and consistent with its administrative responsibilities under this section, including additional eligibility criteria."

Related statute or rule

The following federal statutes and rules directly relate to Electronic Visit Verification:

Section 1903(l) of the Social Security Act, 42 USC 1396b(l)
42 CFR 433.112(b)(14)

Plain language analysis

Section 12006(a) of the federal Cures Act amended section 1903 of the Social Security Act, 42 USC 1396b, and established requirements that state Medical Assistance programs utilize an electronic visit verification ("EVV") system for personal care and home health services. The Cures Act further provides that states who fail to implement EVV for these services by a certain date are subject to a reduction in the federal medical assistance percentage in increasing amounts as years of noncompliance increase. See 42 USC 1396b (l) (1) (a) and (B).

Consistent with the state's obligation to administer MA—and, more specifically to "[c]ooperate with the federal authorities for the purpose of providing the assistance and services available under Title XIX to obtain the best financial reimbursement available to the state from federal funds" under s. 49.46 (2) (a) 7., Stats.—the department has determined that rules are necessary under s. 49.45 (10), Stats., to comply with the EVV requirements created by the Cures Act. The proposed rules will (1) create requirements for providers seeking reimbursement for home health and personal care services to provide requisite EVV data, and (2) establish enforcement mechanisms for these requirements.

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

Section 1903(l) of the Social Security Act, 42 USC 1396b (l), requires Medical Assistance programs to utilize an electronic visit verification system for personal care and home health services in order to gain the maximum amount of federal matching funds available to a state. The following personal care and home health service visit information is required to be electronically verified:

- the type of service performed;
- the individual receiving the service;
- the date of the service;
- the location of service delivery;
- the individual providing the service; and
- the time the service begins and ends.

42 CFR Subpart C establishes regulations of Medical Assistance program mechanized claims processing and information retrieval systems.

42 CFR 433.112(b)(14) requires Medical Assistance programs to claims systems support accurate and timely processing

Comparison with rules in adjacent states

Illinois:

As of January 23, 2023 the State of Illinois outlines their Electronic Visit Verification system (EVV) program in Ill. Admin. Code tit. 89, § 240.1531. This includes technology being utilized, minimum standards, billing integration and data sharing, data storage and security, electronic reporting interface and disaster recovery. In addition, Ill. Admin. Code tit. 89, § 240.1530 outlines the in-home service providers use EVV and that the requirements are in Section 240.1531.

Iowa:

As of January 23, 2023, Iowa has established the definition of the Electronic Visit Verification system (EVV) in rule 441—73.1(249A) and have amended other rules to conform with requirements in the CURES Act.

Michigan:

As of January 23, 2023, Michigan has not established Electronic Visit Verification system (EVV) rules at this time.

Minnesota:

As of January 23, 2023, Minnesota set out their Electronic Visit Verification system (EVV) guidelines via state legislation. Laws of Minnesota 2017, 1st Spec. Sess. chapter 6, article 1, section 49 establishes the requirements and standards for an electronic service delivery documentation system to comply with the 21st Century Cures Act, Public Law 114- 255. Within available appropriations, the commissioner shall take steps to comply with the electronic visit verification requirements in the 21st Century Cures Act, Public Law 114-255.

Summary of factual data and analytical methodologies

The Department relied upon requirements under s. 227.24, Stats., and requirements under the federal Cures Act.

Analysis and supporting documents used to determine effect on small business

The emergency rule is anticipated to have an effect on small business. It is anticipated to be a significant economic impact. See the associated Fiscal Estimate & Economic Impact Analysis.

Effect on small business

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Agency contact person

Bailey Dvorak, DHSAdminRules@dhs.wisconsin.gov, (608) 267-5210.

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. DHS 10.13 (16g) and (16r) are created to read:

DHS 10.13(16g)"Electronic visit verification" or "EVV" means, with respect to personal care services or home health care services as defined and required in Section 12006 of the 21st Century Cures Act, 42 USC 1396b (l), a system under which in-home visits conducted as part of such services are electronically verified.

(16r) "EVV record" means the information or data related to an electronically verified visit which contains all of the following:

- (a) The type of service performed.
- (b) The individual receiving the service.
- (c) The date of the service
- (d) The location of service delivery.
- (e) The individual providing the service.
- (f) The time the service begins and ends.

SECTION 2. DHS 10.41 (2) is amended to read:

SERVICES. Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under [42 USC 1396n](#) (c) and ss. [46.275](#), [46.277](#) and [46.278](#), Stats., the long-term support community options program under s. [46.27](#), Stats., and specified services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan. When providing applicable services, CMOs shall comply with EVV requirements.

SECTION 3. DHS 101.03 (51p) and (51t) are created to read:

DHS 101.03 (51p) "Electronic visit verification" or "EVV" means, with respect to personal care services or home health care services as defined and required in Section 12006 of the 21st Century Cures Act, 42 USC 1396b (l), a system under which in-home visits conducted as part of such services are electronically verified.

(51t) "EVV record" means the information or data related to an electronically verified visit which contains all of the following:

- (a) The type of service performed.
- (b) The individual receiving the service.
- (c) The date of the service
- (d) The location of service delivery.
- (e) The individual providing the service.
- (f) The time the service begins and ends.

SECTION 4 DHS 105.16 (1m) is created to read:

DHS 105.16 (1m) ELECTRONIC VISIT VERIFICATION. The home health provider is required to capture and retain EVV records.

SECTION 5 DHS 105.17 (1g) (cm) is created to read:

DHS 105.17 (1g) (cm) *Electronic visit verification*. The provider is required to capture and retain EVV records.

SECTION 6 DHS 105.19 (7m) is created to read:

DHS 105.19 (7m) ELECTRONIC VISIT VERIFICATION. The nurse is required to capture and retain EVV records.

SECTION 7. DHS 106.03 (2m) is created to read:

DHS 106.03 (2m) EVV REQUIREMENTS FOR CLAIM REIMBURSEMENT. Claims for services that require EVV shall have associated EVV records for applicable services. Claims that require EVV that are not matched to an EVV record may be denied.

SECTION 8. DHS 107.02 (1) (am) is created to read:

DHS 107.02 (1m) When EVV is required for applicable services, claims shall be submitted in accordance with s. DHS 106.03 (2m). Claims that require EVV that are not matched to an EVV record may be denied.

SECTION 9. EFFECTIVE DATE. This rule takes effect upon publication in the state newspaper and shall remain in effect for 150 days, as provided in s. 227.24 (1) (c), Stats., subject to extensions under s. 227.24 (2), Stats.