

Clearinghouse Rule 07-042

PROPOSED ORDER OF DEPARTMENT OF HEALTH AND FAMILY SERVICES TO ADOPT RULES

The Wisconsin Department of Health and Family Services proposes to **repeal and recreate** HFS 83.04 (50) and to **create** HFS 83.04 (33m) and (49m); HFS 83.07 (7m) and Note; HFS 88.02 (14m), (27g), and (27r); HFS 88.03 (4) (c) and Note; HFS 89.13 (17m), (25g), (25r); HFS 89.53 (4) (c) and Note; HFS 132.13 (10m), (25g), (25r); HFS 132.14 (9) and Note; HFS 134.13 (18m), (38g), and (38r); and HFS 134.14 (5r) and Note, rules relating to facility reporting of involuntary administration of psychotropic medication under s. 55.14, Stats., and affecting small businesses.

SUMMARY OF PROPOSED RULE

Statute interpreted: Sections 50.02 (2) (ad) and 55.14, Stats.

Statutory authority: Sections 50.02 (2) (ad) and 227.11 (2) (a), Stats.

Explanation of agency authority: The Department has general authority to regulate and promulgate rules relating to nursing homes; facilities for the developmentally disabled; community-based residential facilities; adult family homes; and residential care apartment complexes under subch. 1 of ch. 50, Stats. (ss. 50.01 to 50.14, Stats). Section 50.02 (2) (ad), Stats., specifically requires the Department to promulgate rules to require each facility licensed under subch. 1 of ch. 50, Stats., to provide information necessary for the Department to assess each facility's compliance with s. 55.14 Stats.

Related statute or rule: Subch. 1 of ch. 50, Stats., and s. 55.14, Stats.

Plain language analysis:

Nursing homes; facilities for the developmentally disabled; community-based residential facilities; adult family homes; and residential care apartment complexes are required to comply with s. 55.14, Stats., relating to involuntary administration of psychotropic medication to an individual pursuant to court ordered protective services.

Section 50.02 (2) (ad), Stats., requires the Department to promulgate rules that require these facilities to provide, to the Department, information necessary to determine the facilities' compliance with s. 55.14, Stats.

The Department proposes to revise chs. HFS 83, 88, 89, 132, and 134 consistent with the requirements of s. 50.02 (2) (ad), Stats., by requiring facilities to report information to the Department about the facility's involuntary administration of psychotropic medication to clients. Definitions of "involuntary administration of psychotropic medication"; "protest"; and "psychotropic medication" from s. 55.14 (1) (a), (c) and (d) Stats., are included in each rule to assist in interpreting the rule requirement and to reduce cross-referencing to the statute.

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

There are no comparable existing or proposed federal regulations.

Comparison with rules in adjacent states:

Illinois has no specific rules that require community-based residential facilities, adult family homes, residential care apartment complexes, nursing homes, or facilities for the developmentally disabled to provide information to the state regulatory agency to show compliance with statutory requirements for involuntary administration of psychotropic medication. Illinois administrative codes for these facilities are as follows:

- Community-based residential facilities and adult family homes: 77 Ill Admin Code 295, Assisted Living and Shared Housing Establishment.
- Residential care apartment complexes: Illinois has no code for residential care apartment complexes.
- Nursing homes: 77 Ill Admin Code 300, Skilled and Intermediate Care Facilities.
- Facilities for the developmentally disabled: 77 Ill Admin Code 350, Intermediate Care for the Developmentally Disabled Facility.

Iowa has no specific rules that require community-based residential facilities, adult family homes, residential care apartment complexes, nursing homes or facilities for the developmentally disabled to provide information to the state regulatory agency to show compliance with statutory requirements for involuntary administration of psychotropic medication. Iowa administrative codes for these facilities are as follows:

- Community-based residential facilities and adult family homes: IAC ch. 57, Residential Care Facilities.
- Residential care apartment complexes: Iowa has no code for residential care apartment complexes that is similar to Wisconsin's code.
- Nursing homes: IAC ch. 58, Nursing Facilities.
- Facilities for the developmentally disabled: IAC ch. 64, Intermediate Care Facilities for the Mentally Retarded.

Michigan has no specific rules that require community-based residential facilities, adult family homes, residential care apartment complexes, nursing homes or facilities for the developmentally disabled to provide information to the state regulatory agency to show compliance with statutory requirements for involuntary administration of psychotropic medication. Michigan administrative codes for these facilities are as follows:

- Community-based resident facilities and adult family homes: Mich. Adm. Code R. 368, Homes for the Aged.
- Residential care apartment complexes: Michigan has no code for residential care apartment complexes.
- Nursing homes and facilities for the developmentally disabled: Mich. Adm. Code R. 325, Nursing Homes and Nursing Care Facilities.

Minnesota has no specific rules that require community-based residential facilities, adult family homes, residential care apartment complexes, nursing homes or facilities for the developmentally disabled to provide information to the state regulatory agency to show compliance with statutory requirements for involuntary administration of psychotropic medication. Minnesota administrative codes for these facilities are as follows:

- Community-based residential facilities and adult family homes: Minn. R. part 4665, Supervised Living Facilities.
- Residential care apartment complexes: Minn. R. part 4655, Boarding Care Homes.

- Nursing homes: Minn. R. part 4658, Nursing Homes.
- Facilities for the developmentally disabled: Minn. R. part 4665, Supervised Living Facilities.

Summary of factual data and analytical methodologies:

The Department relied on all of the following sources to draft the proposed rules or to determine the impact on small businesses; specifically community-based residential facilities, adult family homes, resident care apartment complexes, nursing homes, and facilities for the developmentally disabled:

- The Department formed an advisory committee consisting of Department staff, and representatives of the Wisconsin Board on Aging and Long Term Care; Disability Rights Wisconsin; the Wisconsin Association of Homes and Services for the Aging; and the Wisconsin Health Care Association. The committee reviewed proposed rule language drafted by Department staff.
- The 2002 Economic Census – Wisconsin Geographic Series, which is compiled by the U.S. census bureau every 5 years for each year ending in “2” and “7” and contains the latest available economic data compiled on businesses located in Wisconsin.
- Criteria adopted by the Department and approved by the Wisconsin Small Business Regulatory Review Board to determine whether the Department’s proposed rules would have a significant economic impact on a substantial number of small businesses. Pursuant to the Department’s criteria, a proposed rule would have a significant 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, 2006 is the index year. The consumer price index is compiled by the U.S. Department of Labor, Bureau of Labor Statistics and for 2006 is 3.2 percent.
- DHFS databases, including the Facilities Licensing and Certification information System (FL/CIS), that contain demographic, licensing, program, and compliance history of nursing homes and facilities for the developmentally disabled in Wisconsin.
- DHFS databases, including the Adult Programs Information System (APIS) that contain demographic, licensing, program and compliance history of community-based residential facilities, adult family homes and residential care apartment complexes in Wisconsin.
- The Wisconsin Department of Health and Family Services, Division of Public Health, Bureau of Health Information and Policy. *Wisconsin Nursing Homes and Residents, 2004* (PPH 5374-04), September 2005, which reports data obtained from the Department’s 2004 annual survey of nursing homes. The Department examined whether nursing homes meet the definition of small business under s. 227.114 (1) (a), Stats., and whether the proposed rules would have a significant economic impact on a substantial number of small businesses (nursing homes).
- Section 227.114 (1) (a), Stats., defines “small business” as a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employees 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000.

Analysis and supporting documents used to determine effect on small business:

Affected Industry Description

The proposed rules will affect nursing homes; facilities for the developmentally disabled; community-based residential facilities; adult family homes; and residential care apartment complexes. These entities are included in the North American Industry Classification System (NAICS) Health Care and Social Assistance sector, (sector 62) and further defined in sub-sector 623 Nursing and Residential Care Facilities. Industries in the Nursing and Residential Care Facilities sub-sector generally provide residential care combined with either nursing, supervisory, or other types of care as required by the residents.

Overall, the NAICS 2002 data reports nearly 2,200 facilities in Wisconsin will be affected by these rule changes. These facilities received \$2.7 Billion in revenue in 2002 and employed 72,000 people, and are operated by governmental entities, and private entities such as churches, corporations, partnerships, limited liability companies, and sole proprietorships. Using several sources including published monthly rates for various health care providers, DHFS databases, and standard industry published ratios, the Department estimates that 1,180 of the 2,200 (53 percent) facilities listed in NAICS data are small businesses. The following is an analysis of each facility type:

Community-Based Residential Facilities (CBRF)

Community-based residential facilities provide care, treatment and services above the level of room and board, but not including nursing care. These services include supervision and supportive services included leisure time activities, community activities, health monitoring, medication administration, and transportation services. Community-based residential facilities represent approximately 60 percent of the NAICS establishments, 30 percent of the \$2.7 Billion in annual receipts, and 33 percent of the 72,000 employees in this sub-sector.

Data obtained from the Adult Programs Information System (APIS) database on March 22, 2007 records 1,390 CBRFs as currently licensed to operate in Wisconsin. Approximately 680 (48 percent) of the facilities have 5 to 8 licensed beds and meet the definition of small business. CBRFs are operated by governmental entities, and private entities such as churches, corporations, partnerships, limited liability companies, and sole proprietorships.

Adult Family Homes (AFH)

Adult Family Homes are places where 3 or 4 adults live and receive care and treatment above the level of room and board, but not including nursing care. These services include supervision, recreational activities, assistance with activities of daily living and health monitoring.

Adult family homes represent approximately 33 percent of the NAICS establishments and approximately 6 percent of the \$2.7 Billion in annual receipts in this sub-sector. Data obtained from the Adult Programs Information System (APIS) database on March 22, 2007 records 1,069 AFHs as currently licensed to operate in Wisconsin. This is an increase from 688 facilities since 2002. All adult family homes are licensed for 3 or 4 beds and meet the definition of small business. AFH entities are operated by governmental entities, and private entities such as churches, corporations, partnerships, limited liability companies, and sole proprietorships.

Residential Care Apartment Complexes (RCAC)

Residential care apartment complexes are facilities that provide independent apartments with an individual lockable entrance and exit, a kitchen, an individual bathroom, sleeping area. RCACs provide no more than 28 hours of supportive, personal and nursing services per week to their tenants.

RCACs represent approximately 147 of the NAICS establishments, employing 2,400, and \$95 Million in annual receipts in this sub-sector during 2002. Data obtained from the Adult Programs Information System (APIS) database on March 22, 2007 records 205 RCACs as currently registered or licensed to operate in Wisconsin. Approximately 25 percent of the RCACs meet the definition of small businesses. RCAC entities are operated by governmental entities, and private entities such as churches, corporations, partnerships, limited liability companies, and sole proprietorships.

Nursing Homes

The Department licenses approximately 340 private and 60 government owned nursing homes. Nursing homes primarily provide medical care and nursing services to restore individuals to their rehabilitative potential. The Department estimates that 10% of the privately owned facilities meet the definition of small business.

Facilities for the Developmentally Disabled (FDD)

Facilities in this sub-sector provide residential care to people with developmental disabilities. The care provided is a mix of health and social services, with an emphasis on active treatment for habilitation. The Department currently records 22 licensed FDDs. Various governmental agencies operate 14 FDDs, four are non-profit entities, two are owned by individuals, one for-profit corporation and one limited liability corporation. Based on available Department data, 4 FDDs (18 percent) meet the definition of small business with 30 or fewer beds.

Reporting requirement

Nursing homes; facilities for the developmentally disabled; community-based residential facilities; adult family homes; and residential care apartment complexes are required to comply with s. 55.14, Stats., relating to involuntary administration of psychotropic medication to an individual pursuant to court ordered protective services. Section 50.02 (2) (ad), Stats., requires the Department to promulgate rules that require these facilities to provide, to the Department, information necessary to determine the facilities' compliance with s. 55.14, Stats. The Department proposes to revise chs. HFS 83, 88, 89, 132, and 134 consistent with the requirements of s. 50.02 (2) (ad), Stats., by requiring facilities to report to the Department about the facility's compliance under s. 55.14, Stats.

The Department estimates that it will take facilities an additional 15 minutes per client who receives involuntary administration of psychotropic medications, to provide the additional information; less if the facility does not administer psychotropic medications. Based on a 15 minute assessment per client, the direct salary and fringe cost of compliance should be about \$8 annually per client who involuntarily receives the medication. The time required to complete the reports will increase incrementally with the number of individuals who are administered psychotropic medications involuntarily. The number of clients who may be subject to involuntary administration of psychotropic medication under s. 55.14, Stats., is unknown. All facilities are assumed to have adequate administrative or nursing personnel to comply with the proposed rule; there would not be a need to hire additional staff. The costs of compliance with the proposed rules for any facility should not increase operating expenditures, or decrease revenues by more than the 2006 consumer price index of 3.2 percent.

The costs identified above result from the creation of s. 50.02 (2) (ad) in 2005 Act 264, rather than this proposed rule.

Effect on small business:

Pursuant to the foregoing analysis the proposed rule will affect a substantial number of small businesses, but the rule would not have a significant economic impact on those businesses.

Agency contact person:

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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 date given in the upcoming notice of public hearing. The deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin Administrative Rules Website at <http://adminrules.wisconsin.gov> when the hearing is scheduled. The notice of public hearing will also be published in the Wisconsin Administrative Register.

TEXT OF PROPOSED RULE

SECTION 1. HFS 83.04 (33m) and (49m) are created to read:

HFS 83.04 (33m) “Involuntary administration of psychotropic medication” means any one of the following:

- (a) Placing psychotropic medication in an individual’s food or drink with knowledge that the individual protests receipt of the psychotropic medication.
- (b) Forcibly restraining an individual to enable administration of psychotropic medication.
- (c) Requiring an individual to take psychotropic medication as a condition of receiving privileges or benefits.

HFS 83.04 (49m) “Protest” means make more than one discernible negative response, other than mere silence, to the offer of, recommendation for, or other proffering of voluntary receipt of psychotropic medication. “Protest” does not mean a discernible negative response to a proposed method of administration of the psychotropic medication.

SECTION 2. HFS 83.04 (50) is repealed and created to read:

HFS 83.04 (50) “Psychotropic medication” means a prescription drug, as defined in s. 450.01 (20), Stats., that is used to treat or manage a psychiatric symptom or challenging behavior.

SECTION 3. HFS 83.07 (7m) and Note are created to read:

HFS 83.07 (7m) REPORTING INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION. The licensee shall provide, on a form provided by the department, information required by the department to assess the facility's compliance with s. 55.14, Stats., relating to involuntary administration of psychotropic medication to a resident.

Note: The department will send the form to the provider for completion and submission to the department.

SECTION 4. HFS 88.02 (14m), (27g) and (27r) are created to read:

HFS 88.02 (14m) "Involuntary administration of psychotropic medication" means any one of the following:

(a) Placing psychotropic medication in an individual's food or drink with knowledge that the individual protests receipt of the psychotropic medication.

(b) Forcibly restraining an individual to enable administration of psychotropic medication.

(c) Requiring an individual to take psychotropic medication as a condition of receiving privileges or benefits.

HFS 88.02 (27g) "Protest" means make more than one discernible negative response, other than mere silence, to the offer of, recommendation for, or other proffering of voluntary receipt of psychotropic medication. "Protest" does not mean a discernible negative response to a proposed method of administration of the psychotropic medication.

HFS 88.02 (27r) "Psychotropic medication" means a prescription drug, as defined in s. 450.01 (20), Stats., that is used to treat or manage a psychiatric symptom or challenging behavior.

SECTION 5. HFS 88.03 (4) (c) and Note are created to read:

HFS 88.03 (4) (c) The licensee shall provide, on a form provided by the department, information required by the department to assess the facility's compliance with s. 55.14, Stats., relating to involuntary administration of psychotropic medication to a resident.

Note: The department will send the form to the provider for completion and submission to the department.

SECTION 6. HFS 89.13 (17m), (25g) and (25r) are created to read:

HFS 89.13 (17m) "Involuntary administration of psychotropic medication" means any one of the following:

(a) Placing psychotropic medication in an individual's food or drink with knowledge that the individual protests receipt of the psychotropic medication.

(b) Forcibly restraining an individual to enable administration of psychotropic medication.

(c) Requiring an individual to take psychotropic medication as a condition of receiving privileges or benefits.

HFS 89.13 (25g) "Protest" means make more than one discernible negative response, other than mere silence, to the offer of, recommendation for, or other proffering of voluntary receipt of psychotropic medication. "Protest" does not mean a discernible negative response to a proposed method of administration of the psychotropic medication.

HFS 89.13 (25r) "Psychotropic medication" means a prescription drug, as defined in s. 450.01 (20), Stats., that is used to treat or manage a psychiatric symptom or challenging behavior.

SECTION 7. HFS 89.53 (4) (c) and Note are created to read:

HFS 89.53 (4) (c) The licensee shall provide, on a form provided by the department, information required by the department to assess the facility's compliance with s. 55.14, Stats., relating to involuntary administration of psychotropic medication to a tenant.

Note: The department will send the form to the provider for completion and submission to the department.

SECTION 8. HFS 132.13 (10m), (25g), and (25r) are created to read:

HFS 132.13 (10m) "Involuntary administration of psychotropic medication" means any one of the following:

(a) Placing psychotropic medication in an individual's food or drink with knowledge that the individual protests receipt of the psychotropic medication.

(b) Forcibly restraining an individual to enable administration of psychotropic medication.

(c) Requiring an individual to take psychotropic medication as a condition of receiving privileges or benefits.

HFS 132.13 (25g) "Protest" means make more than one discernible negative response, other than mere silence, to the offer of, recommendation for, or other proffering of voluntary receipt of psychotropic medication. "Protest" does not mean a discernible negative response to a proposed method of administration of the psychotropic medication.

HFS 132.13 (25r) "Psychotropic medication" means a prescription drug, as defined in s. 450.01 (20), Stats., that is used to treat or manage a psychiatric symptom or challenging behavior.

SECTION 9. HFS 132.14 (9) and Note are created to read:

HFS 132.14 (9) REPORTING INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION. The licensee shall provide, on a form provided by the department, information required by the department to assess the facility's compliance with s. 55.14, Stats., relating to involuntary administration of psychotropic medication to a resident.

Note: The department will send the form to the provider for completion and submission to the department.

SECTION 10. HFS 134.13 (18m), (38g), and (38r) are created to read:

HFS 134.13 (18m) "Involuntary administration of psychotropic medication" means any one of the following:

(a) Placing psychotropic medication in an individual's food or drink with knowledge that the individual protests receipt of the psychotropic medication.

(b) Forcibly restraining an individual to enable administration of psychotropic medication.

(c) Requiring an individual to take psychotropic medication as a condition of receiving privileges or benefits.

HFS 134.14 (38g) "Protest" means make more than one discernible negative response, other than mere silence, to the offer of, recommendation for, or other proffering of voluntary receipt of psychotropic medication. "Protest" does not mean a discernible negative response to a proposed method of administration of the psychotropic medication.

HFS 134.14 (38r) "Psychotropic medication" means a prescription drug, as defined in s. 450.01 (20), Stats., that is used to treat or manage a psychiatric symptom or challenging behavior.

SECTION 11. HFS 134.14 (5r) and Note are created to read:

HFS 134.14 (5r) REPORTING INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION. The licensee shall provide, on a form provided by the department, information required by the department to assess the facility's compliance with s. 55.14, Stats., relating to involuntary administration of psychotropic medication to a resident.

Note: The department will send the form to the provider for completion and submission to the department.

SECTION 12. EFFECTIVE DATE: The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health and Family Services

Dated:

Kevin R. Hayden, Department Secretary

SEAL: