

## Clearinghouse Rule 19-087

### WISCONSIN DEPARTMENT OF HEALTH SERVICES PROPOSED ORDER TO ADOPT PERMANENT RULES

The Wisconsin Department of Health Services proposes an order to **repeal** DHS 105.17 (2) (b) (2.) (note); to **amend** DHS 105.17 (1n) (a) 2. b. and (d) 1., and DHS 105.17 (2) (b) 2.; to **repeal and recreate** DHS 105.17 (2) (b) 1., DHS 105.17 (5) (b) and (c); to **create** DHS 105.17 (1) (ag), DHS 105.17 (1e) (f) to (L) and (1k), DHS 105.17 (3) (a) 4. and 5., and DHS 105.17 (6) and (7), **relating to** personal care providers.

#### **RULE SUMMARY**

##### **Statute interpreted**

None.

##### **Statutory authority**

Sections 49 (2) (a) 11., (10) and (42), Stats.

##### **Explanation of agency authority**

Section 49.45 (2) (a) 11., Stats., authorizes the department to establish criteria for certification of providers of Medical Assistance, certify providers who meet certification criteria and promulgate rules to implement the statute.

Section 49.45 (10), Stats., authorizes the department to promulgate rules consistent with its duties in administering Medical Assistance, including its duties relating to reimbursement for personal care service by certified providers.

Section 227.11 (2) (a), Stats., allows agencies to promulgate rules interpreting the provision of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

##### **Related statute or rule**

chs. DHS 101, 106 and 107.

##### **Plain language analysis**

The 2009 - 2011 biennial budget bill expanded the types of entities that could be certified by the Department of Health Services ("department") as Medicaid personal care providers to include free-standing personal care agencies (PCAs), in addition to counties, federally recognized American Indian tribes and bands, home health agencies, and independent living centers. Section DHS 105.17 was revised July 2010 in response to the addition of free-standing PCAs. Since 2010, the department has certified 389 free-standing PCAs, with an additional 8 free-standing PCAs in the process of being certified.

The department has determined that existing standards contained in s. DHS 105.17 are not adequate to monitor compliance with Medicaid requirements and to prevent fraud, waste, and abuse by PCAs in the Medicaid program. In addition, the department determined that provisions relating to the health, safety, and rights of clients receiving services from PCAs or subcontractors could be strengthened.

The department therefore intends to revise s. DHS 105.17 and propose changes relating to governing bodies, staff qualifications, minimum age requirements, supervision of personal care

workers, quality improvement, facility closure and provider certification.

**2a. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

Pursuant to s. 49.45 (2) (a) 11., Stats., the department proposes to amend s. DHS 105.17 as follows:

On-site survey prior to certification

Currently, the department recommends a PCA for provisional certification based on a review of the PCA's application packet and without conducting an on-site survey of the PCA. An on-site survey is not required and may not be conducted by the department for several months after provisional certification is granted, at which time significant problems may be identified. The department proposes to revise the certification standards of s. DHS 105.17 to require an on-site survey and a finding of substantial compliance with the regulations before provisional certification may be granted to the PCA.

Duties of the personal care provider

Currently, there is no requirement for a PCA to adopt written policies, procedures and a statement outlining the services to be provided. The department proposes to establish standards that would require a PCA to develop operating policies and procedures, and develop a statement of the services to be provided by the PCA and to notify the department when there is a change in administrator and if there a change in the location of the agency.

Administrator and administrator qualifications

Currently, there is no requirement for a PCA to appoint an administrator and substitute administrator responsible for supervising daily operations. The department proposes to establish standards requiring the appointment of a qualified administrator and substitute administrator responsible for ensuring that staff is knowledgeable and compliant with requirements governing PCAs. Existing administrators will not be subject to newly proposed qualification requirements.

Quality improvement program

Currently, a PCA is not required to have a quality improvement program to evaluate the effectiveness of its program and services. The department proposes to establish standards that would require PCAs to have an ongoing quality improvement committee. The committee would be responsible for evaluating client services, identifying areas of improvement, and documenting and implementing plans to correct any problems.

Minimum age and skills set for personal care workers

Currently, no minimum age or skill set requirements are specified in s. DHS 105.17 for personal care workers providing services to vulnerable clients in their homes. The department proposes to revise s. DHS 105.17 to establish minimum age and qualification requirements for personal care workers to ensure that vulnerable clients receive adequate care.

Supervision of the personal care worker

Currently, s. DHS 105.17 requires that a registered nurse conduct a supervisory visit in the client's home every 60 days to evaluate the client's condition, review the plan of care, review the personal care worker's written record and, when needed, discuss with the physician any necessary changes in the plan of care. The supervisory visit is not required to be conducted during the provision of personal care services, so workers are not directly observed providing personal care services. The department proposes to require that the supervisory visits be conducted by the registered nurse when the personal care worker is present, to require the registered nurse to observe the personal care worker providing care to the client, and to

evaluate whether staff is providing care in compliance with regulatory requirements.

#### Agency closure

Currently, PCAs are not required to notify a client or the client's representative when the PCA is closing, or to provide assistance to the client in arranging for continuity of necessary services. The department therefore intends to revise s. DHS 105.17 to ensure clients or their representatives are provided sufficient notice and assistance in obtaining alternative personal care services in the event of a PCA closure.

#### **2b. Analysis of policy alternatives**

The department could choose not to revise s. DHS 105.17. However, this alternative is not reasonable because the department has determined that oversight of PCAs is inadequate to ensure a minimum standard of care for vulnerable clients, and to prevent fraud, waste, and abuse by PCAs in the Medicaid program.

The department could choose to propose voluntary guidelines for PCAs, rather than establishing standards by rule. However, this alternative is not reasonable because voluntary compliance with such guidelines would prevent the department from ensuring consistency in the standard of care provided to vulnerable clients. In addition, voluntary compliance with such guidelines would impede the department's efforts to reduce fraud, waste, and abuse in the Medicaid program.

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

Section 440.167 of 42 CFR contains the requirements for providing personal care services to Medicaid recipients. Section 440.167 does not provide detail on the types of agencies that are allowed to provide personal care services or to directly bill the Medicaid program for reimbursement.

#### **Comparison with rules in adjacent states**

##### **Illinois:**

Wisconsin offers personal care as an optional Medicaid state plan service but Illinois does not. Illinois does offer some type of personal care services under waivers. Title 77, Chapter 6, Part 245, Home Health, Home Services and Home Nursing Code. Illinois State Code requires that all home services agencies in Illinois be licensed. Services provided by these agencies may include activities of daily living support, personal care, medication reminders, housekeeping, laundry and assistance getting to and from appointments. Providers of home services are required to conduct background check on all employees and develop and implement policies and procedures for investigating and preventing abuse, neglect and financial exploitation. All alleged incidents must be reported and a written report prepared of the investigation of all allegations or reasonable suspicion that a client has been a victim of abuse, neglect, of financial exploitation. The investigation report must include the dates, times and description of the alleged abuse, neglect or financial, exploitation, a description of injury or abuse to the client, actions taken by the licensee, individuals and agencies interviewed or notified by the licensee and a description of the actions to be taken by the licensee to prevent further occurrences.

Providers are required to control and prevent infections and adhere to the guidelines of the Centers for Disease Control and Prevention. Each provider must develop a quality improvement program that reviews, at least quarterly, a sample of active and closed client records to assure that polices are followed in providing services. Home service programs must provide a service plan for each client served, in consultation with the client, and the appropriate family member or representatives. Home services workers must not have a disqualifying background check and must complete at least 8 hours of training and

competency evaluations that shows the person is competent to provide services. The competency evaluation must cover communication skills, performing personal care tasks, basic hygiene, confidentiality of client personal records, health information, promoting dignity, disaster procedures and abuse and neglect prevention and reporting.

**Iowa:**

Wisconsin offers personal care as an optional Medicaid state plan service but Iowa does not. Iowa does offer some type of personal care services under waivers. Iowa Administrative Code 441—78.53 (249A) Health home services. Health home services consist of a comprehensive, timely, and high-quality manner using health information technology to link services, comprehensive care management providing for all the member's health care needs, or taking responsibility for arranging care with other qualified professionals; developing and maintaining for each member a continuity of care document that details all aspects of the member's needs, treatment plan, and medication list; and implementing a formal screening tool to assess needs. Care coordination consists of helping the client adhere to their medication regimen, manage chronic disease, getting to and from appointments, and understanding health insurance coverage. Home services providers are required to assist clients to enhance safety, disease prevention, and an overall healthy lifestyle. Providers are also expected to provide comprehensive transitional care following a member's move from an inpatient setting to another setting.

**Michigan:**

Michigan and Wisconsin offer personal care as an optional Medicaid state plan service. Michigan home care services cover a wide range of supportive activities that serve to supplement, maintain or restore a person's independence. Care in the home may involve both non-medical home care services and skilled home health care services. Non-medical services offer assistance with chores, housecleaning and with activities of daily living such as bathing, eating, hygiene, dressing and ambulation. The State of Michigan does not regulate non-medical home care services. Providers of these services establish their own policies and practices regarding their business operation. Business practices may differ in hiring, screening and monitoring of staff, pricing of services, types and terms of service delivery (e.g. minimum number of hours for a visit).

**Minnesota:**

Minnesota offers personal care as an optional Medicaid state plan service. Minn. Stat. §256B.0625 subd. 19c., Minn. Stat. §256B.0659 subd. 13 and subd. 25. Personal care assistance (PCA) is a service for people who need help with day-to-day activities so they can be more independent in their homes and communities. Services include activities of daily living, such as eating, dressing, moving within one's home, meal planning and preparation, shopping, and traveling to medical appointments and community activities, observation and redirection of behaviors and health-related procedures and tasks. To receive personal care services in Minnesota, a person must be on Medical Assistance or be a pregnant woman or child enrolled in MinnesotaCare, be able to make decisions about their own care or have someone who can make the decisions for them, live in a home or apartment, need help with activities such as those listed above.

Freestanding PCA agencies are not required to have a state license. However, the Minnesota Department of Health licenses some agencies, such as home health agencies, that provide PCA services. PCA agencies must renew their enrollment as a Minnesota Health Care Programs provider on an annual basis to assure that they meet provider standards and are qualified to provide services. Individual PCAs must also meet provider standards by enrolling as a Minnesota Health Care Programs provider, passing a criminal background study and satisfactorily completing required online training. All PCA services must be supervised by a qualified professional as defined in state statute. A qualified professional in a registered nurse, licensed social worker, mental health professional or a qualified developmental disabilities specialist. Services are to be provided under the direction of a care plan. The care plan must be completed or updated within the first seven days of starting services with a PCA provider agency, when there is a change in condition, tasks, procedure, living arrangements, responsible party or annually at the time of the reassessment. The PCA care plan can only include services that are allowable as covered services and cannot include services identified as non-covered services.

### **Summary of factual data and analytical methodologies**

The department formed an advisory committee composed of representative of the Wisconsin Personal Services Association (WSPA), Wisconsin Homecare Organization (WHO), Counties and personal care agencies. Representative from these organizations were provided a copy of the initial draft of the rule and asked for comments.

### **Analysis and supporting documents used to determine effect on small business**

The department solicited information and advice from individuals, businesses, associations representing businesses, and local governmental units who may be affected by the proposed rule for use in analyzing and determining the economic impact that the rules would have on businesses, individuals, public utility rate payers, local governmental units, and the state's economy as a whole from 11/12/18-11/26/18.

Public comments were received that define a qualified trainer to mean a person trained by an RN and that would require an RN to evaluate a qualified trainer annually. Commentors cited workforce considerations and said that this would cause a financial hardship to the agency. The department did include this language in the updated proposed rule.

Additional language was included in the proposed rule that would require a branch office to be a physical location and eliminate the use of technology to meet client needs, particularly in rural areas. Recognizing the financial impact and impact of residents in rural Wisconsin as outlined by public comments, the department did not include this language in the updated proposed rule.

The department sought to require personal care workers to be a minimum of 18 years old. Public commentors stated that they employ staff who are 16 years old and suggested a minimum age of 16 years. The department changed the minimum working age to 16 in the updated proposed rule.

Public comments were received regarding requiring the use and anticipated cost of an electronic visit verification system. The department did not include this language in the updated proposed rule.

The department also received comments regarding the qualifications for the substitute administrator. In the updated proposed rule, the substitute administrator is not required to meet the qualifications of the administrator.

**Effect on small business**

Based on the foregoing analysis, the rules are anticipated to have little to no economic impact on small businesses.

**Agency contact person**

Pat Benesh, 608-264-9896, Patricia.Benesh@wi.gov

**Statement on quality of agency data**

The data used by the Department to prepare these propose rules and analysis comply with § 227.14 (2m), Wis. Stats.

**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 105.17 (1) (ag) is created to read:

DHS 105.17 (1) (ag) "Delegated medical act" means an act that is delegated to an RN or L.P.N. by a physician, podiatrist, dentist or optometrist.

**SECTION 2.** DHS 105.17 (1e) (f) to (L) are created to read:

DHS 105.17 (1e) (f) Adopt written policies, procedures and documents that outline agency operations.

DHS 105.17 (1e) (g) Adopt a statement detailing the services to be provided.

DHS 105.17 (1e) (h) Oversee the management of the agency.

DHS 105.17 (1e) (i) Appoint an administrator.

DHS 105.17 (1e) (j) Provide for a qualified substitute administrator to act in absence of the administrator.

DHS 105.17 (1e) (k) Notify the department in writing within 10 days of any appointment or change of the administrator or the substitute administrator.

DHS 105.17 (1e) (L) Notify the department in writing within 10 days of a change in the location of the agency or contact information for the personal care provider.

**SECTION 3.** DHS 105.17 (1k) is created to read:

DHS 105.17 (1k) ADMINISTRATOR AND ADMINISTRATOR QUALIFICATIONS.

(a) The administrator of a personal care agency shall meet all of the following requirements:

1. Be at least 21 years of age.
2. Have the ability to fulfill the job requirements, respond to the needs of the clients, and manage the personal care agency.
3. Have an associate degree or higher in a health care related field from an accredited college, or a bachelor's degree in a field other than in health care from an accredited college and one year experience working in a health care related field.
4. Training and experience in health care administration and at least one year of supervisory or administrative experience in home health care or personal care, or a related health program.
5. Be knowledgeable about this chapter and s. DHS 107.112, and take all reasonable steps to ensure that the personal care agency complies with the requirements of this chapter.
6. Be responsible for the overall provision of training and competency of all employees.

(b) Persons who are the qualified administrator of record with the department of a personal care agency on the effective date of this rule shall be exempt from the qualification requirements specified under sub. (1k)(a).

**SECTION 4.** DHS 105.17 (1n) (a) 2. b., and (d) 1. are amended to read:

DHS 105.17 (1n) (a) 2. b. Information concerning specific job duties. Training shall be provided for each skill the personal care worker is assigned and shall include a successful demonstration of each skill by the personal care worker to the qualified trainer, under the supervision of the RN supervisor, prior to providing the service to a client independently. Only an RN may train others on a delegated act as defined in s. N 6.02 (5) and N 6.03. The RN or qualified trainer shall document the personal care worker's successful demonstration of each skill and maintain the information in their personnel file.

DHS105.17 (1n) (d) 1. Supervise the provision of personal care services. Except as provided in subd. 2., services for all clients shall be supervised by ~~a registered nurse~~ an RN according to the requirements set forth in s. DHS 107.112 (3) (a) and (c). The visit to the client's home by an RN shall be conducted at a time when the personal care worker will be directly observed providing personal care services to the client in the client's home. The RN shall document the results of the visit including the observation of the personal care worker and maintain the information in their personnel file or other designated agency file. When observation of the personal care worker by the RN reveals a failure to follow the client's care plan, the personal care provider shall provide counseling, education or retraining to ensure the personal care worker is adequately trained to complete their job responsibilities.

**SECTION 5.** DHS 105.17 (2) (b) 1. is repealed and recreated to read:

DHS 105.17 (2) (b) 1. Assess and evaluate the need for services according to the standards of practice contained in s. N 6.03 (1) (a) and (d), and make referrals to other services as appropriate. Documentation shall be signed and dated by the RN supervisor who conducted the assessment and evaluation, attesting to its accuracy and truthfulness.

**SECTION 6.** DHS 105.17 (2) (b) 2. is amended to read:

DHS 105.17 (2) (b) 2. Secure written orders from the client's physician. These orders are to be renewed once every 3 months unless the physician specifies that orders covering a period

of time up to one year are appropriate, or when the client's needs change, whichever occurs first. Physician orders for personal care services are not required for clients who are not Medicaid recipients unless the personal care service is a delegated medical act as defined in s. N 6.02 (4). This provision does not mitigate the RN supervisor's responsibility to follow the standards contained in ch. N 6.

**SECTION 7.** DHS 105.17 (2) (b) (2.) (note) is repealed.

**SECTION 8.** DHS 105.17 (3) (a) 4. and 5. are created to read:

DHS 105.17 (3) (a) 4. Have the skills, education, experience and ability to fulfill the employee's job requirements.

DHS 105.17 (3) (a) 5. Be at least 16 years old.

**SECTION 9.** DHS 105.17 (5) (b) and (c) are repealed and recreated to read:

DHS 105.17 (5) (b) *Recommendation for certification.* 1. Following receipt of a complete application for MA certification or for a change in certification when there has been a change in the ownership of a personal care agency, the department shall review the application, and investigate the applicant and principals to determine the applicant's ability to comply with this section and s. DHS 107.112.

2. Within 90 days after receiving a complete application, the department shall either approve or deny the application. Approval will be effective for a 1-year period from the date a complete application was submitted to the department.

3. The applicant shall submit a written request to the department for an on-site survey within 9 months of the date the application was approved.

4. The applicant shall show that the agency has served at least 5 clients requiring personal care services during the period of the approved application. At the time of the on-site survey, the applicant or its personnel shall demonstrate provision of personal care services to at least 2 clients.

5. If the applicant does not submit a written request for an on-site survey within 9 months of the date the application was approved, the application will no longer be valid.

6. Within 90 days following completion of an on-site survey, the department shall either recommend certification or not recommend certification of the applicant to the department's division of medicaid services.

DHS 105.17 (5) (c) *Non approval.* The department shall not approve certification for any applicant who does not comply with any provision of this chapter, s. DHS 107.112 or ch. 50, Wis. Stats., or who is not fit and qualified as specified in DHS 105.17 (1e) (e) or who has failed to pay any fee or any outstanding amounts due to the department.

**SECTION 10.** DHS 105.17 (6) and (7) are created to read:

DHS 105.17 (6) QUALITY ASSESSMENT AND ASSURANCE COMMITTEE.

(a) A personal care agency shall establish a quality assessment and assurance committee for the purpose of identifying and addressing quality of care issues. The committee shall include all of the following members:

1. The administrator.
2. The substitute administrator.
3. The registered nurse supervisor.
4. At least 1 other member of the agency's staff.



DHS 105.17 (6) (b) The quality assessment and assurance committee shall do all of the following:

1. Meet at least quarterly to identify quality of care issues that require quality assessment and assurance activities.
2. Develop and implement appropriate plans of action to correct identified quality of care issues.

DHS 105.17 (6) (c) The department may not require disclosure of the records of the quality assessment and assurance committee except to determine compliance with the requirements of this section.

DHS 105.17 (7) AGENCY CLOSURE. (a) Any personal care agency that intends to close shall provide written notice to each client, the client's legal representative, if any, the client's attending physician and the department at least 30 days before closing.

DHS 105.17 (7) (b) The personal care agency shall provide assistance to clients in arranging for continuity of necessary services.

**SECTION 11. EFFECTIVE DATE:** This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in § 227.22 (2) (intro.), Wis. Stats.