

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

Clearinghouse Rule 21-067

The Wisconsin Department of Health Services (“the Department”) proposes an order to: **repeal** DHS 102.03 (4), 102.04 (4), 103.03 (1) (g) 4. and (1) (h) 5., 103.087 (1) (h) 5., 109.11 (6) (e); **amend** DHS 103.03 (intro.), 103.08 (2) (c) 1. and 2. and 103.09 (2) and (3) (a) to (c); and **create** DHS 102.03 (4), 102.04 (4), 103.03 (1) (g) 4. and (1) (h) 5., 103.087 (1) (h) 5. and 109.11 (6) (e), relating to Medicaid eligibility requirements.

RULE SUMMARY

Statute interpreted

None.

Statutory authority

Section 227.11 (2) (a), Stats.:

(2) 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 49.45 (10), Stats:

RULE-MAKING POWERS AND DUTIES. The department is authorized to promulgate such rules as are consistent with its duties in administering medical assistance. The department shall promulgate a rule defining the term “part-time intermittent care” for the purpose of s. 49.46.

2019 Wis. Act 185 s. 105:

(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.

Explanation of agency authority

Section 49.45 (10), Stats., permits the Department to “promulgate such rules as are consistent with its duties in administering medical assistance.” In 2019 Wis. Act 185 s. 105 (1) (a) to (d) (“Act 185”), the Wisconsin Legislature permitted the Department to suspend certain Medicaid eligibility requirements during the federal public health emergency related to the COVID-19 pandemic in order to qualify for an enhanced medical assistance percentage. Thus, in accordance with the Department’s authority to promulgate rules to carry out its duties in administering Medical Assistance under s. 49.45 (10), Stats, and the authority under Act 185 to suspend certain eligibility requirements, the department has express authority to promulgate the proposed rule.

Related statute or rule

The rule will supplant emergency rule EmR2116 which was published in the state newspaper and took effect under s. 227.24 (1) (c), Stats., on June 5, 2020 .

The following statutes or rules directly relate to gaining increased federal funding made available under s. 6008 of the Families First Coronavirus Response Act (“the FFCRA”), Pub. L. No. 116-127:

- Section 1135(g)(1)(B) of the Social Security Act of 1935, as amended
- Section 6008 (b) (3) of the FFCRA.
- Section 49.45 (1) and (2) (a) 7., Stats.
- 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)

Plain language analysis

The intent of the 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 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) and does not increase Medicaid premiums during the federal emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320b-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. That declaration has been renewed several times, and the public health emergency remains in effect through July 2021. In a letter to state 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 2021.¹ As vaccination rates across the country decrease,² 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 emergency 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 EmR2033, which suspended provisions in chs. DHS 102, 103, and 109 in order to comply with s. 6008 of FFCRA. EmR2033 was extended for the maximum 120 days allowed under s. 227.24 (2), Stats., and it expired on May 30, 2021. The Governor approved a successor emergency rule to EmR2033 on May 26, 2021, and that rule, EmR2116, was published and took effect in accordance with s. 227.24 (1) (c), Stats., on June 5, 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 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 of Medicaid recipients during the declared emergency period. The permanent rule will create sunset provisions that seek to amend or create provisions in chs. DHS 102, 103 and 109 specific to maintaining continuous Medicaid enrollment, and then repeal those provisions after end 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, and not increase Medicaid premiums during the designated time periods.

Comparison with rules in adjacent states

Illinois:

Not applicable – The rule order is based on authority explicitly granted in 2019 Act 185 s. 105 (1) (a)-(d) and is required in order to gain increased federal funding made available under s. 6008 of the Families First Coronavirus Response Act, P.L. 116-127.

¹ A copy of this letter is available at <https://cf.georgetown.edu/wp-content/uploads/2021/01/Public-Health-Emergency-Message-to-Governors.pdf>

² The 7-day moving average of total doses of vaccines administered from June 8, 2021 to July 8, 2021 decreased by approximately 58%. See *Covid Data Tracker: Trends in Number of COVID-19 Vaccinations in the US*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#vaccination-trends> (last visited July 14, 2021).

Iowa:

Not applicable – The rule order is based on authority explicitly granted in 2019 Act 185 s. 105 (1) (a)-(d) and is required in order to gain increased federal funding made available under s. 6008 of the Families First Coronavirus Response Act, P.L. 116-127.

Michigan:

Not applicable – The rule order is based on authority explicitly granted in 2019 Act 185 s. 105 (1) (a)-(d) and is required in order to gain increased federal funding made available under s. 6008 of the Families First Coronavirus Response Act, P.L. 116-127.

Minnesota:

Not applicable – The rule order is based on authority explicitly granted in 2019 Act 185 s. 105 (1) (a)-(d) and is required in order to gain increased federal funding made available under s. 6008 of the Families First Coronavirus Response Act, P.L. 116-127.

Summary of factual data and analytical methodologies

The Department relied upon requirements under ch. 227, Stats., and information provided to the Department by the Legislative Reference Bureau.

Analysis and supporting documents used to determine effect on small business

The rule is not anticipated to have an effect on small business. See the associated Fiscal Estimate & Economic Impact Analysis.

Effect on small business

The rule is not anticipated to have an effect on small business.

Agency contact person

Laura Brauer, DHSDMSAdminRules@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. DHS 102.03 (4) is created to read:

DHS 102.03 (4) Subdivisions (1) to (3) shall not be enforced until the first day of the month following the end of the emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320b-5(g)), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic.

SECTION 2. DHS 102.03 (4), as affected by this rule, is repealed.

SECTION 3. DHS 102.04 (4) is created to read:

DHS 102.04 (4) REVIEW OF ELIGIBILITY SUSPENDED DURING THE COVID-19 PANDEMIC. All provisions regarding the review of eligibility in accordance with sub. (3) shall be suspended until the first day of the month following the end of the emergency period defined in par. (1)(B) or s. 1135(g) of the Social

Security Act, 42 USC 1320b-5(g)), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic.

SECTION 4. DHS 102.04 (4), as affected by this rule, is repealed.

SECTION 5. DHS 103.03 (intro.) is amended to read:

DHS 103.03 **Non-financial conditions for eligibility.** In order to be eligible for MA, a person shall meet both non-financial conditions for eligibility in this section and financial conditions for eligibility under s. DHS 103.04. Once determined eligible, a person shall continue to receive benefits until the person either requests the benefits to be ended, the person loses Wisconsin residency as defined in sub. (3), or the person becomes deceased. The non-financial conditions for eligibility are:

SECTION 6. DHS 103.03 (intro.), as affected by this rule, is amended to read:

DHS 103.03 (intro.) **Non-financial conditions for eligibility.** In order to be eligible for MA, a person shall meet both non-financial conditions for eligibility in this section and financial conditions for eligibility under s. DHS 103.04. ~~Once determined eligible, a person shall continue to receive benefits until the person either requests the benefits to be ended, the person loses Wisconsin residency as defined in sub. (3), or the person becomes deceased.~~ The non-financial conditions for eligibility are:

SECTION 7. DHS 103.03 (1) (g) 4. and (1) (h) 5. are created to read:

DHS 103.03 (1) (g) 4. The non-financial eligibility requirements in s. subs. 1. of this paragraph shall not be enforced until the first day of the month following the end of the emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320b-5(g)), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic.

DHS 103.03 (1) (h) 5. ‘Suspension during the COVID-19 pandemic.’ The Medicaid purchase plan health and employment counseling eligibility provisions in this subs. 1. to 4. of this par. shall not be enforced until the first day of the month following the end of the emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320b-5(g)), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic.

SECTION 8. DHS 103.03 (1) (g) 4. and (1) (h) 5., as affected by this rule, are repealed.

SECTION 9. DHS 103.08 (2) (c) 1. is amended to read:

DHS 103.08 (2) (c) 1. Once the expenditure or obligation of excess income has been achieved, the AFDC-related or SSI-related MA group shall ~~be eligible for the balance of the 6-month spend-down period, unless it is determined that assets have increased enough to make the MA group ineligible, or that a change in circumstances has caused someone in the MA group to become ineligible for non-financial reasons~~ remain eligible for MA.

SECTION 10. DHS 103.08 (2) (c) 1., as affected by this rule, is amended to read:

DHS 103.08 (2) (c) 1. Once the expenditure or obligation of excess income has been achieved, the AFDC-related or SSI-related MA group shall remain ~~eligible for MA~~ be eligible for the balance of the 6-month spend-down period, unless it is determined that assets have increased enough to make the MA group ineligible, or that a change in circumstances has caused someone in the MA group to become ineligible for non-financial reasons.

SECTION 11. DHS 103.08 (2) (c) 2. is amended to read:

DHS 103.08 (2) (c) 2. If the entire group is determined ineligible, the MA benefits shall be discontinued with proper notice. If only one person in the MA group is determined ineligible for non-financial reasons, only that person's AFDC-related or SSI-related MA benefits shall, with proper notice, be discontinued. The other person or persons in the MA group continue their eligibility until the end of the 6-month period. This provision shall not be enforced until the first day of the month following the end of the emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320b-5(g), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic.

SECTION 12. DHS 103.08 (2) (c) 2., as affected by this rule, is amended to read:

DHS 103.08 (2) (c) 2. If the entire group is determined ineligible, the MA benefits shall be discontinued with proper notice. If only one person in the MA group is determined ineligible for non-financial reasons, only that person's AFDC-related or SSI-related MA benefits shall, with proper notice, be discontinued. The other person or persons in the MA group continue their eligibility until the end of the 6-month period. ~~This provision shall not be enforced during the emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320b-5(g), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic.~~

SECTION 13. DHS 103.087 (1) (h) 5. is created to read:

DHS 103.087 (1) (h) 5. The requirements of this paragraph shall not be enforced until the first day of the quarter or the first day of the calendar month following the month in which the emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320b-5(g), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic, whichever occurs later.

SECTION 14. DHS 103.087 (1) (h) 5., as affected by this rule, is repealed.

SECTION 15. DHS 103.09 (2) and (3) (a) to (c) are amended to read:

DHS 103.09 (2) ~~FOUR-MONTH CONTINUATION OF ELIGIBILITY~~ CONTINUATION OF ELIGIBILITY WHEN EXCESS INCOME FROM SPOUSAL SUPPORT. When an MA group becomes ineligible for AFDC due solely to excess income, is receiving child support payments and all of the excess income consists of child support collections, and has received an AFDC payment in at least 3 of the 6 months immediately preceding the month in which ineligibility begins, eligibility for MA shall continue ~~for 4 months~~ from the date that AFDC eligibility was terminated. The 6 months preceding the month in which ineligibility begins includes the month in which the MA group became ineligible for AFDC if the MA group was eligible for and received AFDC for that month.

DHS 103.09 (3) ~~TWELVE-MONTH CONTINUATION OF ELIGIBILITY~~ CONTINUATION OF ELIGIBILITY WHEN EARNED INCOME CHANGES.

(a) When an MA group becomes ineligible for AFDC due to loss of the earned income disregards under s. 49.19 (5) (a) 4. and 4m., or (am), Stats., or to a change in the amount of earned income disregards under s. 49.19 (5) (a) 4. and 4m., or (am), Stats., eligibility for MA shall continue ~~for 12 months~~ from the date that AFDC eligibility was terminated.

DHS 103.09 (3) (b) When an MA group becomes ineligible for AFDC due to an increase in earned income or an increase in hours of employment or a combination of increased earned income and increased hours of employment, eligibility for MA shall continue ~~for 12 months~~ from the date that AFDC eligibility was terminated provided that at least one member of the MA group received AFDC for at least 3 of the 6 months immediately preceding the month in which AFDC was discontinued and at least one member of the MA group is continuously employed during that period.

DHS 103.09 (3) (c) When an MA group becomes ineligible for AFDC due to an increase in earned income, or to a combination of an increase in earned income and in increase in child support payments, and has received an AFDC payment in at least 3 of the 6 months immediately preceding the month in which ineligibility begins, eligibility for MA shall continue ~~for 12 months~~ from the date that AFDC eligibility was terminated. The 6 months preceding the month in which ineligibility begins includes the month in which the MA group became ineligible for AFDC if the MA group was eligible for and received AFDC for that month.

SECTION 16. DHS 103.09 (2) and (3) (a) to (c), as affected by this rule, are amended to read:

DHS 103.09 (2) ~~CONTINUATION OF ELIGIBILITY WHEN EXCESS INCOME FROM SPOUSAL SUPPORT~~ FOUR-MONTH CONTINUATION OF ELIGIBILITY When an MA group becomes ineligible for AFDC due solely to excess income, is receiving child support payments and all of the excess income consists of child support collections, and has received an AFDC payment in at least 3 of the 6 months immediately preceding the month in which ineligibility begins, eligibility for MA shall continue for 4 months from the date that AFDC eligibility was terminated. The 6 months preceding the month in which ineligibility begins includes the month in which the MA group became ineligible for AFDC if the MA group was eligible for and received AFDC for that month.

DHS 103.09 (3) ~~CONTINUATION OF ELIGIBILITY WHEN EARNED INCOME CHANGES- TWELVE-MONTH~~ CONTINUATION OF ELIGIBILITY

(a) When an MA group becomes ineligible for AFDC due to loss of the earned income disregards under s. 49.19 (5) (a) 4. and 4m., or (am), Stats., or to a change in the amount of earned income disregards under s. 49.19 (5) (a) 4. and 4m., or (am), Stats., eligibility for MA shall continue for 12 months from the date that AFDC eligibility was terminated.

DHS 103.09 (3) (b) When an MA group becomes ineligible for AFDC due to an increase in earned income or an increase in hours of employment or a combination of increased earned income and increased hours of employment, eligibility for MA shall continue for 12 months from the date that AFDC eligibility was terminated provided that at least one member of the MA group received AFDC for at least 3 of the 6 months immediately preceding the month in which AFDC was discontinued and at least one member of the MA group is continuously employed during that period.

DHS 103.09 (3) (c) When an MA group becomes ineligible for AFDC due to an increase in earned income, or to a combination of an increase in earned income and in increase in child support payments, and has received an AFDC payment in at least 3 of the 6 months immediately preceding the month in which ineligibility begins, eligibility for MA shall continue for 12 months from the date that AFDC eligibility was terminated. The 6 months preceding the month in which ineligibility begins includes the month in which the MA group became ineligible for AFDC if the MA group was eligible for and received AFDC for that month.

SECTION 17. DHS 109.11 (6) (e) is created to read:

DHS 109.11 (6) (e) Subsection (6) (a) to (d) shall not be enforced until the first day of the month following the end of the emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320b-5(g)), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic.

SECTION 18. DHS 109.11 (6) (e), as affected by this rule, is repealed.

SECTION 19. EFFECTIVE DATES. In accordance with s. 227.22 (2) (intro.), Stats., these rules shall take effect on the first day of the month following publication in the administrative register, except as follows:

Sections 2, 4, 6, 8, 10, 12, 16, and 18 of this rule order shall take effect on the first day of the month after the emergency period, as defined in s. 1135 (g) (1) (b) of the Social Security Act, 42 U.S.C. § 1320b-5 (g) (1) (B) and declared in response to the COVID-19 pandemic, ends.

Section 14 of this rule order shall take effect on the first day of the month after the last day of the quarter or on the first day of the calendar month following the month in which the emergency period, as defined in s. 1135 (g) (1) (b) of the Social Security Act, 42 U.S.C. § 1320b-5 (g) (1) (B) and declared in response to the COVID-19 pandemic, ends, whichever occurs later.