

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

**Clearinghouse Rule 21-081**

The Wisconsin Department of Health Services (“the Department”) proposes an order to **amend** DHS 10.31 (4) (b), 10.32 (4), 10.34 (4) (a), 10.44 (2) (e), and 10.45 (2) (b), relating to requirements for adult long-term care.

**RULE SUMMARY**

**Statute interpreted**

Not applicable

**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 227.24 (1) (a), Stats.: An agency may, except as provided in s. 227.136 (1), promulgate rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

Section 46.286 (2) (c), Stats.: A person who is required to contribute to the cost of his or her care but who fails to make the required contributions is ineligible for the family care benefit unless he or she is exempt from the requirement under rules promulgated by the department.

Section 46.288, Stats.: The department shall promulgate as rules all of the following:

- (1) Standards for performance by resource centers and for certification of care management organizations, including requirements for maintaining quality assurance and quality improvement.
- (2) Criteria and procedures for determining functional eligibility under s. 46.286 (1) (a), financial eligibility under s. 46.286 (1) (b), and cost sharing under s. 46.286 (2) (a).
- (3) Procedures and standards for procedures for s. 46.287 (2), including time frames for action by a resource center or a care management organization on a contested matter.

Section 50.02 (2) (d), Stats.: The department shall promulgate rules that prescribe all of the following:

1. The method by which community-based residential facilities shall make referrals to resource centers or county departments under s. 50.035 (4n) and the method by which residential care apartment complexes shall make referrals to resource centers under s. 50.034 (5n).
2. The time period for nursing homes to provide information to prospective residents under s. 50.04 (2g) (a) and the time period and method by which nursing homes shall make referrals to resource centers under s. 50.04 (2h) (a).

2019 Wis. Act 185 s. 105 (1):

(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.

. . . (10) LEGISLATIVE OVERSIGHT OF THE MEDICAL ASSISTANCE PROGRAM.

(a) Section 20.940 does not apply to a request for a waiver, amendment to a waiver, or other federal approval from the department of health services submitted to the federal department of health and human services during the public health emergency declared under 42 USC 247d by the secretary of the federal department of health and human services on January 31, 2020, in response to the 2019 novel coronavirus, only if the request is any of the following, relating to the Medical Assistance program:

- . . . 17. Allowing flexibility for submission of electronic signatures on behalf of a Medical Assistance recipient by application assistants if a signature cannot be captured in person
- . . . 37. Relating to the home and community-based waiver programs of Family Care, IRIS, and Children's Long-Term Supports, any of the following:
  - . . . a. Allowing all waiver services and administrative requirements that that can be provided with the same functional equivalency of face-to-face services to occur remotely.
  - . . . zb. Adding a verbal and electronic method to signing required documents.
  - . . . zc. Allowing the option to conduct evaluations, assessments, and person-centered service planning meetings virtually or remotely in lieu of face-to-face meetings.
  - . . . zs. Allowing the suspension of involuntary disenrollments.

**Explanation of agency authority**

Sections 46.286 (4) to (7), 46.287 (2) (a) 1. (intro.), 46.288, 50.02 (2) (d) direct the Department to implement rules for the family care, which is a Medicaid long-term care program that helps families arrange for appropriate long-term care services for family members for adults with physical or developmental disabilities. The rules include financial eligibility criteria and cost sharing requirements.

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. In accordance with the authority under Act 185 to suspend certain Medicaid eligibility requirements, the department has express authority to promulgate the proposed rule.

**Related statute or rule**

This rule will supplant EmR2121, which is effective through January 1, 2022. The Department is also promulgating a permanent rule in light of the ongoing need to suspend rule provisions as permitted under Act 185 and to comply with s. 6008 of the FFCRA.

The following statutes or rules directly relate to gaining increased federal funding made available under s. 6008 of the FFCRA:

- Section 1135(g)(1)(B) of the Social Security Act of 1935, as amended
- Section 6008 (b) (3) of the Families First Coronavirus Response Act, P.L. 116-127
- 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)

The following statutes or rules directly relate to complying with the federally-approved program changes made under the Family Care 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum:

- Section 46.286 (2), (4) to (7), Stats.
- Section 46.287 (2) (a) 1., Stats.
- Section 50.02, Stats.
- 2019 Act 185 s. 105 (10) (a) 17. and 37. a., zb., zc. and zs.

**Plain language analysis**

The intent of the emergency 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 the 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) during the federal emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320-5(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 up to \$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.<sup>1</sup> That declaration has been renewed several times, and the public health emergency remains in effect through October 2021.<sup>2</sup> In a letter to governors, the United States Secretary of Health and Human Services represented that the federal public

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<sup>1</sup> A copy of the original Determination that a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

<sup>2</sup> A copy of the July 2021 Renewal of Determination That a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-19July2021.aspx>.

health emergency will likely remain in place for the entirety of 2021.<sup>3</sup> 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 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 2040 ("EmR2040"), which suspended provisions in ch. DHS 10 in order to comply with s. 6008 of FFCRA. EmR2040 was extended for the maximum 120 days allowed under s. 227.24 (2), Stats., and expired on July 20, 2021.

In order to continue complying with section 6008 of the FFCRA and to receive up to \$150 million in federal funding per quarter, the Department has determined that, in light of the ongoing need to suspend rule provisions to comply with s. 6008 of the FFCRA, 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 in Medicaid during the declared emergency period. The permanent rule will create sunset provisions that seek to amend or create provisions in ch. DHS 10 specific to maintaining continuous enrollment, and then repeal those provisions after the end of the federal public health emergency.

Additionally, the rule seeks to align with federally-approved program changes permitted under s. 105 (10) (a) of Act 185, which authorized the Medicaid program to amend program waivers in response to the COVID-19 pandemic. The Family Care program operates under concurrent 1915(b) and 1915(c) waivers, as described by section 1915 of the Social Security Act. *See* 42 USC 1396n(b)-(c). Based on s. 105 (10) (a) of Act 185, the Department requested, and the Centers for Medicare and Medicaid Services approved, an amendment to the Family Care 1915(c) waiver. This waiver amendment, known as Appendix K: Emergency Preparedness and Response and COVID-19 Addendum, is in effect from March 1, 2020 to no later than six months after the expiration 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.

Additional Family Care program flexibilities implemented to protect against and control the spread of communicable diseases have been explicitly granted by the Centers for Medicare & Medicaid Services through the approval of the Appendix K: Emergency Preparedness and Response and COVID-19 Addendum to the 1915(c) Family Care program waiver. The Family Care program is unique to Wisconsin. Adjacent states administer their own versions of home and community-based services programs through 1915(c) waivers and have received similar flexibilities through Appendix K: Emergency Preparedness and Response and COVID-19 Addenda.

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

#### **Illinois:**

Illinois will similarly need to maintain continuous Medicaid eligibility for persons enrolled in Medicaid in order to gain increased federal funding made available under s. 6008 of the FFCRA. Additionally, it has received federal authority to allow for electronic signatures and virtual/remote meetings in lieu of face-to-face assessment interviews through a 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum.

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<sup>3</sup> A copy of this letter is available at <https://ccf.georgetown.edu/wp-content/uploads/2021/01/Public-Health-Emergency-Message-to-Governors.pdf>

**Iowa:**

Iowa will similarly need to maintain continuous Medicaid eligibility for persons enrolled in Medicaid in order to gain increased federal funding made available under s. 6008 of the FFCRA. Additionally, it has received federal authority to allow for electronic signatures and virtual/remote meetings in lieu of face-to-face assessment interviews through a 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum.

**Michigan:**

Michigan will similarly need to maintain continuous Medicaid eligibility for persons enrolled in Medicaid in order to gain increased federal funding made available under s. 6008 of the FFCRA. Additionally, it has received federal authority to allow for electronic signatures and virtual/remote meetings in lieu of face-to-face assessment interviews through a 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum.

**Minnesota:**

Minnesota will similarly need to maintain continuous Medicaid eligibility for persons enrolled in Medicaid in order to gain increased federal funding made available under s. 6008 of the FFCRA. Additionally, it has received federal authority to allow for virtual/remote meetings in lieu of face-to-face assessment interviews through a 1915(c) waiver Appendix K: Emergency Preparedness and Response and COVID-19 Addendum.

**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 emergency 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 businesses.

**Agency contact person**

Laura Brauer, DHSAdminRules@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 10.31 (4) (b) is amended to read:

DHS 10.31 (4) (b) *Signing the application*. The applicant or the applicant’s legal guardian, authorized representative or, where the applicant is incapacitated, someone acting responsibly for the applicant, shall sign each application form, ~~in the presence of a representative of the agency. The signatures of 2 witnesses are required when the applicant signs the application with a mark~~ The signature may be provided using electronic methods identified by the department as constituting a signature.

**SECTION 2.** DHS 10.31 (4) (b), as affected by this rule, is amended to read:

DHS 10.31 (4) (b) *Signing the application.* The applicant or the applicant's legal guardian, authorized representative or, where the applicant is incapacitated, someone acting responsibly for the applicant, shall sign each application form ~~.The signature may be provided using electronic methods identified by the department as constituting a signature. in the presence of a representative of the agency. The signatures of 2 witnesses are required when the applicant signs the application with a mark.~~

**SECTION 3.** DHS 10.32 (4) is amended to read:

DHS 10.32 (4) REVIEW OF ELIGIBILITY. Enrollees' eligibility for the family care benefit shall be re-determined annually or more often when a county agency has information indicating that a change has occurred in an enrollee's circumstances that would affect his or her eligibility or cost sharing requirements. This subsection shall not be enforced 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 10.32 (4), as affected by this rule, is amended to read:

DHS 10.32 (4) REVIEW OF ELIGIBILITY. Enrollees' eligibility for the family care benefit shall be re-determined annually or more often when a county agency has information indicating that a change has occurred in an enrollee's circumstances that would affect his or her eligibility or cost sharing requirements. ~~This subsection shall not be enforced 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 5.** DHS 10.34 (4) (a) is amended to read:

DHS 10.34 (4) (a) Except as provided in par. (b), a person who is required to contribute to the cost of his or her care but who fails to make the required contributions is ineligible for the family care benefit. Individuals who do not make the required contributions under this paragraph shall not be deemed ineligible for the family care benefit 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 6.** DHS 10.34 (4) (a), as affected by this rule, is amended to read:

DHS 10.34 (4) (a) Except as provided in par. (b), a person who is required to contribute to the cost of his or her care but who fails to make the required contributions is ineligible for the family care benefit. ~~Individuals who do not make the required contributions under this paragraph shall not be deemed ineligible for the family care benefit 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 7.** DHS 10.44 (2) (e) is amended to read:

DHS 10.44 (2) (e) The CMO shall use assessment protocols that include ~~a face-to-face~~ an interview with the enrollee and that comprehensively assess and identify all of the following:

**SECTION 8.** DHS 10.44 (2) (e), as affected by this rule, is amended to read:

The CMO shall use assessment protocols that include ~~an~~ a face-to-face interview with the enrollee and that comprehensively assess and identify all of the following:

**SECTION 9.** DHS 10.45 (2) (b) is amended to read:

DHS 10.45 (2) (b) A CMO may not disenroll any enrollee except under circumstances specified in its contract with the department and the express approval of the department, unless the enrollee has requested to be disenrolled. When a CMO requests department approval to disenroll an enrollee, the CMO shall refer the enrollee to the resource center for counseling under s. DHS 10.23 (2) (j). A CMO may not encourage any enrollee to disenroll. This paragraph 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 10.** DHS 10.45 (2) (b), as affected by this rule, is amended to read:

DHS 10.45 (2) (b) A CMO may not disenroll any enrollee except under circumstances specified in its contract with the department and the express approval of the department, unless the enrollee has requested to be disenrolled. When a CMO requests department approval to disenroll an enrollee, the CMO shall refer the enrollee to the resource center for counseling under s. DHS 10.23 (2) (j). A CMO may not encourage any enrollee to disenroll. ~~This paragraph 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 11.** 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 and 8 of this rule order shall take effect upon the termination of the Appendix K: Emergency Preparedness and Response and COVID-19 Addendum to the 1915 (c) Family Care program waiver.

Sections 4, 6, and 10 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.