

**STATEMENT OF SCOPE**  
**WISCONSIN DEPARTMENT OF HEALTH SERVICES**

CHAPTER: DHS 102, 103 and 109  
RELATING TO: Medicaid Eligibility Requirements  
RULE TYPE: Emergency  
SCOPE TYPE: Original

**EMERGENCY:** Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule because, in order to comply with 2019 Wis. Act 185 s. 105 (1) (d), which requires the state, in order to comply with s. 6008 of the federal Families First Coronavirus Response Act (FFCRA) to maintain continuous Medicaid eligibility for persons enrolled in Medicaid from March 18, 2020 or later, unless the person leaves the state or requests disenrollment. Furthermore, many of the provisions of chs. DHS 102, 103 and 109 contain requirements that could either result in Medicaid recipients from being disenrolled due to circumstances outside their control, such as Medicaid Purchase Plan (MAPP) premiums and work requirements, which could thereby prevent them from receiving necessary treatment due to the spread of COVID-19. Finally, this emergency rule is necessary because many local Medicaid agencies are understaffed due to COVID-19 and strict compliance with rule provisions is impractical under current circumstances.

**SUMMARY**

**1. Description of rule objectives**

On March 12, 2020, Governor Evers issued Executive Order 72, which, in accordance with s. 323.10, Stats., declared a public health emergency related to COVID-19. Executive Order 72 further designated the Department of Health Services (“the department”) as the lead agency to respond to the public health emergency. The Governor directed the department to take all necessary and appropriate measures to respond to, and prevent the spread of, COVID-19 in the state—including suspending any administrative rule provisions for which strict compliance would prevent, hinder, or delay necessary actions to respond to the emergency and increase the health threat.

On April 17, 2020, 2019 Wisconsin Act 185 (Act 185) became effective. Section 105 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 must 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.

On May 4, 2020, Governor Evers and Secretary-designee Palm issued Emergency Order 35, which ordered the suspension of a number of administrative rules, including the following rule sections related to Medicaid eligibility requirements:

- Section DHS 102.03, which requires an applicant or recipient to submit verification of income, assets, or nonfinancial conditions of Medicaid eligibility.
- Section DHS 102.04 (3), which establishes timeframes for the department to confirm ongoing eligibility of Medicaid recipients.
- Section DHS 103.03 (1) (g) 1., which requires all participants in the MAPP be employed or in training for employment.
- Section DHS 103.08 (2) (c), which creates a 6-month certification period for asset spend-down.
- Section DHS 103.087 (1) (h), which creates procedures for disenrolling MAPP recipients for non-payment of premiums.
- Section DHS 103.09 (2) and (3), which creates time-limits on eligibility for members whose counted income exceeds the eligibility limit.
- Section DHS 109.11 (6), which creates timelines for the department to confirm ongoing eligibility of SeniorCare recipients.

The Governor's public health emergency declaration is currently set to expire on May 11, 2020, per s. 323.10, Stats., and that expiration will effectively nullify Emergency Order 35. In order to preserve the public peace, health, safety, and welfare under s. 227.24 (1) (a), Stats., and in accordance with the department's authority under s. 252.02 (4) and (6), Stats., to promulgate rules and implement emergency measures to protect against, and control the spread of, communicable diseases, the department proposes to temporarily suspend all of the afore-mentioned rules in a manner consistent with Emergency Order 35. Furthermore, in order to comply with Act 185, the following rules need to be suspended as well:

- Section DHS 103.03, which creates non-financial eligibility requirements for members.
- Section 103.04, which creates income and asset limits for members.

## **2. Existing policies relevant to the rule and policies proposed to be included in the rule**

Strict compliance with the current rules could result in many recipients of Medicaid programs losing necessary coverage for failing to verify or meet various requirements related to finances, employment, payment of premiums, or asset spend-down. This result would be inconsistent with the requirements of Act 185, which requires the state to maintain "continuous enrollment" and eligibility in order to comply with section 6008 of the FFCRA. Many disenrollments could be the byproduct of circumstances outside the recipient's control, such as loss of employment or income, which were caused by the spread of

COVID-19. Furthermore, disenrolling Medicaid recipients at a time when there is greater risk of contracting COVID-19 would deprive them of access to Medicaid-provided testing and treatment. This emergency rule therefore proposes to temporarily suspend all of the aforementioned rule provisions in order to comply with Act 185 and reduce the risk that individuals who receive Medicaid are disenrolled and deprived of necessary and potentially life-saving testing or treatment.

### **3. Analysis of policy alternatives**

There are no reasonable alternatives to emergency rulemaking. Governor Evers and Secretary-designee Palm jointly ordered that these above-referenced administrative rules be suspended on May 4, 2020, and that order will expire on May 11, 2020.

### **4. Statutory authority for the rule**

#### **a. Explanation of authority to promulgate the proposed rule**

The Department is authorized to promulgate the rule based upon explicit statutory language.

#### **b. Statute/s that authorize/s the promulgation of the proposed rule**

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

#### Section 252.02 (4) and (6), Stats.:

(4) . . . [T]he department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control or suppression of communicable diseases, for the quarantine and disinfection of personals, localities and things infected or suspected of being infected by a communicable disease . . .

(6) The department may authorize and implement all emergency measures necessary to control communicable diseases.

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

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.

c. Statute/s or rule/s that will affect the proposed rule or be affected by it

Section 49.46 (1), Stats.

Section 49.46 (1) (c) & (cg), Stats.

Section 49.47(4) (b) & (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.

**5. Estimates of the amount of time that state employees will spend to develop the rule and other necessary resources**

The estimated time for state employees to develop the rule is 40 hours.

**6. Description of all of the entities that may be affected by the emergency rule, including any local governmental units, businesses, economic sectors, or public utility ratepayers who may reasonably be anticipated to be affected by the rule**

This requested suspension of Medical Assistance rules will affect the work done by County and Tribal human services agencies administering the Medicaid and Children's Health Insurance Program (CHIP) programs by increasing their recipient caseloads. It will also affect medical providers by decreasing the number of uninsured patients.

**7. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule**

42 CFR § 435.952(c)(3) Requires that self-attestation for all eligibility criteria be accepted when documentation is not reasonably available to the individual during a natural disaster.

The suspension of Medical Assistance rules is needed to comply with conditions spelled out by section 6008(b) of the Families First Coronavirus Response Act, Public Law 116-127 in order for the State of Wisconsin to qualify for an increase in federal match of 6.2 percentage points for the Medicaid and CHIP programs for the duration of the federal emergency. These requirements include a prohibition of the termination or reduction of benefits for any person who was receiving Medicaid on March 18, 2020, and for any person who is determined eligible for Medicaid on or after March 18. The prohibition is to last through the end of the month following the end of the emergency period declared by the Secretary of the federal Department of Health and Human Services.

**8. Anticipated economic impact, locally or statewide**

The proposed rule will have minimal or no economic impact.

**9. Agency contacts**

Mark R. Thompson, Admin. Rules Attorney

Office of Legal Counsel

(608) 266-1279

[mark.thompson1@dhs.wisconsin.gov](mailto:mark.thompson1@dhs.wisconsin.gov)

Jackson Keuler, Admin. Rules Officer

Office of Legal Counsel

(608) 266-0387

[jackson.keuler@dhs.wisconsin.gov](mailto:jackson.keuler@dhs.wisconsin.gov)