

STATEMENT OF SCOPE

WISCONSIN DEPARTMENT OF HEALTH SERVICES

CHAPTER: DHS 129

RELATING TO: Certification of Programs for Training and Testing Nurse Aides and Feeding Assistants

RULE TYPE: Emergency

SCOPE TYPE: Original

FINDING OF EMERGENCY: Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule. The following rules should be addressed because many facilities that employ certified nursing assistants (CNA) and feeding assistants are losing these staff because the residents or patients those facilities serve are higher risk for COVID-19 due to age and pre-existing conditions. There is currently a high demand to bring new CNAs into the workforce via “emergency” or expedited training programs, but those programs are not compliant with many of the requirements under ch. DHS 129. If emergency rules are not passed, those emergency training programs will either have to: (1) individually seek waivers or variances, which will add delay and uncertainty regarding training new CNAs; or (2) close, which will result in a supply of CNAs that is inadequate to meet the state’s increased demand.

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 3, 2020, Governor Evers and Secretary-designee Palm signed Emergency Order 21, which ordered the suspension of a number of administrative rules, including various sections of ch. DHS 129. Those suspensions aimed to address increased demand for CNAs and feeding assistants due to higher turnover in those positions because their clientele typically posed a higher risk to contract COVID-19. The rule suspensions allowed nursing homes, technical colleges, and private training programs to offer “emergency” or expedited training programs for CNAs to help meet a growing demand. The Governor’s public health emergency declaration expired on May 11, 2020, per s. 323.10, Stats., and that expiration

effectively nullified Emergency Order 21. These emergency training programs do not comport with all of the requirements of ch. DHS 129, and these programs will have to close—and Wisconsin will continue to experience a shortage of in-demand CNAs and feeding assistants—if emergency rules are not promulgated.

In order to preserve the public peace, health, safety, and welfare under s. 227.24 (1) (a), 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:

- Suspend in its entirety s. DHS 129.03 (8), which defines the “clinical setting” in which CNAs must obtain clinical experience for certification, in its entirety.
- Suspend in part s. DHS 129.03 (30), which defines “nurse aide,” in accordance with s. 146.40, Stats., to temporarily permit greater flexibility for the CNAs who provide services in Wisconsin.
- Suspend in part ss. DHS 129.03 (37) and 129.06 (1) (a), which require that clinical instructors for CNA training programs to have at least 2 years prior experience working as a nurse and completion of a course in adult education, to permit any registered nurse in Wisconsin with working experience to act as a clinical instructor.
- Suspend in its entirety s. DHS 129.05 (2) (b), which requires on-site preliminary approvals and reviews of training programs by the department, in its entirety.
- Suspend in its entirety DHS 129.06 (1) (e), which sets standards for primary instructors of nurse aide training programs to attend a pre-approved training course.
- Suspend in its entirety s. DHS 129.09 (5) (a), which provides eligibility for inclusion on the registry within 120 days of beginning employment.
- Suspend in part ss. DHS 129.11 to .20 which pertains to feeding assistants, to allow facilities to utilize non-nurse aids to provide feeding assistance to individuals who do not have complications with eating or swallowing.

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

Section DHS 129 contains requirements that will prevent the ongoing provision of emergency programs that quickly train new CNAs—which are severely needed due to staffing shortages caused by the spread of COVID-19 in Wisconsin. Training programs may seek waivers or variances under s. DHS 129.04, but those have to be granted on a case-by-case basis and will add extra administrative strain, delay the provision of training, and provide uncertainty while programs request and wait for the results of a waiver or variance request. Furthermore, s. DHS 129.04 (2) (d) provides a hearing procedure for waiver or variance denials, which could add further delay and uncertainty.

Suspension of the aforementioned provisions of s. DHS 129 will temporarily provide the flexibility needed for nursing homes, technical colleges, and private training programs to continue to offer emergency training programs to quickly train new CNAs and meet the increased demand in Wisconsin.

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 in Emergency Order 21 on April 3, 2020, and that order expired 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 146.40 (1) (aw), (3g), (5) (a), Stats:

(1) (aw) "Feeding assistant" means an individual who has completed a state-approved training and testing program, as specified by the department by rule, or training, as described in sub. (2m), that satisfies the state-approved training requirement, to perform one nursing-related duty, as defined by the department by rule.

...

(2m) A nursing home or intermediate care facility for persons with an intellectual disability, whether or not the nursing home or intermediate care facility is a certified provider of medical assistance, may not employ or contract for the services of an individual as a feeding assistant, regardless of the title under which the individual is employed or contracted for, unless the individual has successfully completed a state-approved training and testing program, as specified by the department by rule. Any relevant education, training, instruction, or other experience that an individual has obtained in connection with any military service, as defined in s. 111.32 (12g), counts toward satisfying the requirement to complete the state-approved training program under this subsection, if the individual or the nursing home or intermediate care facility demonstrates to the satisfaction of the department that the education, training, instruction, or other experience obtained by the individual is substantially equivalent to the state-approved training program.

...

(3) Except as provided in sub. (4d), the department shall approve instructional programs for nurse aides that apply for, and satisfy standards for, approval that are promulgated by rule by the department. The department may not require an instructional program to exceed the federally required minimum total training hours or minimum hours of supervised practical training under 42 CFR 483.152 (a). The department shall review the curriculum of each approved instructional program at least once every 24 months following the date of approval to determine whether the program continues to satisfy the standards for approval. Under this subsection, the department may, after providing notice, suspend or revoke the approval of an instructional program or impose a plan of correction on the program if the program fails to satisfy the standards for approval or operates under conditions that are other than those contained in the application approved by the department.

(3g) Except as provided in sub. (4d), the department shall approve instructional programs for nurse aides that apply for approval; that satisfy standards for approval that are promulgated by rule by the department; and that allow an individual who has successfully completed an instructional program for nurse aides in another state to receive instruction in this state that, when combined with the instructional program in the other state, will result in the individual having received substantially the same instruction as an individual who successfully completes an instructional program approved under sub. (3). Only an individual so described may complete an instructional program for nurse aides that is approved under this subsection. The department shall review the curriculum of each approved instructional program at least once every 24 months following the date of approval to determine whether the program continues to satisfy the requirements of this subsection. Under this subsection, the department may, after providing notice, suspend or revoke the approval of an instructional program or impose a plan of correction on the program if the program fails to satisfy the requirements of this subsection or operates under conditions that are other than those contained in the application approved by the department.

...

(5)

(a) The department shall promulgate rules specifying standards for approval in this state of instructional programs and competency evaluation programs for nurse aides. The standards shall include specialized training in providing care to individuals with special needs.

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.

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 persons, 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.

c. Statutes or rules that will affect the proposed rule or be affected by it

Section 146.40 (3), (3g), and (5), 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 emergency 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 chapter applies to any facility, agency or other organization that proposes to (1) maintain a registry of nurse aides, (2) train or administer competency evaluation testing of nurse aides, feeding assistants, or medication aides under a program approved by or the department, and (3) all persons automatically included or eligible for inclusion and requesting inclusion in the department's registry of nurse aides.

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

Federal conditions of participation for the registry of nurse aides, nurse aide training and testing programs, and training of paid feeding assistants are contained in 42 CFR 483.150 to 483.160. These regulations establish conditions and standards for the approval of nurse aide training and competency evaluation programs, for the maintenance and operation of a registry, and for conducting training and testing programs for nurse aides and paid feeding assistants. State and federal regulations for registry services and training and testing of nurse aide and paid feeding assistants are comparable.

8. Anticipated economic impact, locally or state wide

The proposed rule will have minimal or no economic impact.

Agency contacts

Mark R. Thompson, Admin. Rules Attorney
Office of Legal Counsel
(608) 266-1279
mark.thompson1@dhs.wisconsin.gov

Jackson Keuler, Admin. Rules Officer
Office of Legal Counsel
(608) 266-0387
jackson.keuler@dhs.wisconsin.gov