

# WISCONSIN DEPARTMENT OF HEALTH SERVICES

## PROPOSED ORDER TO ADOPT PERMANENT RULES

The Wisconsin Department of Health Services (“the department”) proposes an order to **amend** DHS 107.02 (3) (a), relating to complex rehabilitation technology prior authorization review.

### RULE SUMMARY

#### **Statute interpreted**

Section 49.45 (9r) (d), Stats.

#### **Statutory authority**

Sections 49.45 (9r) (b) and (d), and (10), and 227.11 (2), Stats.

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

Section 49.45 (10), Stats., authorizes the department to “promulgate such rules as are consistent with its duties in administering medical assistance.” 49.45 (9r) (b), Stats., directs the department to “promulgate rules and other policies for use of complex rehabilitation technology by recipients of Medical Assistance.” The department therefore has express rulemaking authority consistent with s. 227.11 (2), Stats., to amend s. DHS 107.02 (3) (a) for consistency with s. 49.45 (9r) (d), Stats., which was created by 2019 Wis. Act 186 (“Act 186”).

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

The following statutes and rules directly relate to or address complex rehabilitation technology.

42 USC § 1395m

42 USC § 1395w-3(a)

42 USC § 1395x(n)

42 USC § 1396b(i)(27)

42 CFR § 440.70

42 CFR § 441.15

CMS SMD# 18-001

s. 49.45 (9r), Stats.

DHS 101.03 (28g) and (28m)

DHS 105.54

DHS 107.24

#### **Plain language analysis**

Section 49.45, (9r) (d), Stats., which was created by Act 186, directs the department to make a determination on prior authorization requests for complex rehabilitation technology within 10 working days of receiving complete, clinically relevant written documentation. As it is currently written, s. DHS 107.02 (3) (a) provides that “[t]he department or its fiscal agent shall act on 95% of requests for prior authorization within 10 working days and on 100% of requests for prior authorization within 20 working days from the receipt of all information necessary to make the determination.”

The intent of the proposed rules is to establish rules consistent with s. 49.45 (9r) (b), Stats., by requiring the department to make determinations on all prior authorization requests for complex rehabilitation technology within 10 working days of receiving complete, clinically relevant written documentation.

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

42 CFR §440.70(b)(3) requires that states provide medical equipment, including durable medical equipment of which complex rehabilitation technology is a subset, suitable for use in the home as home health services and that this equipment be reviewed by a physician annually.

42 CFR §441.15 requires that states provide medical equipment, including durable medical equipment of which complex rehabilitation technology is a subset, as home health services.

“Medicare Program; End-Stage Renal Disease Prospective Payment System, Payment for Renal Dialysis Services Furnished to Individuals With Acute Kidney Injury, End-Stage Renal Disease Quality Incentive Program, Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Fee Schedule Amounts, DMEPOS Competitive Bidding (CBP) Proposed Amendments, Standard Elements for a DMEPOS Order, and Master List of DMEPOS Items Potentially Subject to a Face-to-Face Encounter and Written Order Prior to Delivery and/or Prior Authorization Requirements,” 84 Fed. Reg. 151,38330 (2019) proposes to change 42 CFR §414.234(b) to establish a master list of durable medical equipment, of which complex rehabilitation technology is a subset, requiring a face-to-face encounter with a provider, written authorization or prescription, and prior authorization in order to be a covered Medicare service.

“Medicare Program: Modernizing and Clarifying the Physician Self-Referral Regulations,” 84 Fed. Reg. 201,55766 (2019) proposes to change 42 CFR §§411.351 and 441.357 to exclude durable medical equipment suppliers from being value-based enterprise participants.

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

### **Illinois:**

As of February 2, 2021, the state has rules related to prior authorization requirements for complex rehabilitation technology under 305 Ill. Stat. 5 and 89 Ill. Admin. Code s. 140.478. The Medicaid agency is directed to establish rules for provision of durable medical equipment including prior authorization requirements. The agency has established rules requiring prior authorization determinations to be completed within 21 days when the requested technology costs less than \$100 and within 30 days when the requested technology costs more than \$100.

### **Iowa:**

As of February 16, 2021, the state has rules related to prior authorization requirements for complex rehabilitation technology under IAC ch. 294A, 441 IAC ss. 78.10(294A), 78.28(249A), 441 IAC, and 79.8(249A), and the Medicaid provider handbook. The Medicaid agency has established prior authorization for customized durable medical equipment that costs \$500 or more and generally a 14 calendar day review period.

### **Michigan:**

As of February 22, 2021, the state has rules related to prior authorization requirements for complex rehabilitation technology under Act 280 of 1939 s. 400.111j. The Medicaid agency may require prior authorization for medical equipment with a 15 work day review period. The agency has determined that prior authorization is required for complex rehabilitation technology when it costs more than \$500.

### **Minnesota:**

As of February 19, 2021, the state has rules related to prior authorization requirements for complex rehabilitation technology under Minn. Stats. s. 256B.0625 subd. 25. and Minn. Admin. Code 9505.0310. These rules generally require prior authorization for durable medical equipment. State Medicaid policy establishes a 10 business day review period for prior authorization requests.

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

The department relied on requirements set forth in s. 49.45 (9r) (d), Stats.

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

The department published a solicitation in the Administrative Register from May 3, 2021 to May 17, 2021, in which it requested comments on the economic impact of the proposed rule.

## **Effect on small business**

Based on the economic impact public commenting period and the analysis provided in fiscal estimate and economic impact analysis, the proposed rule is anticipated to have little to no economic impact on small businesses.

## **Agency contact person**

Laura Brauer

[DHSDMSAdminRules@dhs.wisconsin.gov](mailto:DHSDMSAdminRules@dhs.wisconsin.gov)

608.266.5368

## **Statement on quality of agency data**

The data used by the Department to prepare these proposed rules and analysis comply with s. 227.14 (2m), 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 107.02 (3) (a) is amended to read:

DHS 107.02 (3) (a) *Procedures for prior authorization*. The department may require prior authorization for covered services. In addition to services designated for prior authorization under each service category in this chapter, the department may require prior authorization for any other covered service for any reason listed in par. (b). The department shall notify in writing all affected providers of any additional services for which it has decided to require prior authorization. The department or its fiscal agent shall act on 95% of requests for prior authorization within 10 working days and on 100% of requests for prior authorization within 20 working days from the receipt of all information necessary to make the determination, excluding requests for complex rehabilitation technology prior authorization. The department or its fiscal agent shall act on 100% of requests for complex rehabilitation technology prior authorization within 10 working days of receiving complete, clinically relevant written documentation necessary to make a determination. The department or its fiscal agent shall make a reasonable attempt to obtain from the provider the information necessary for timely prior authorization decisions. When prior authorization decisions are delayed due to the department's need to seek further information from the provider, the recipient shall be notified by the provider of the reason for the delay.

**SECTION 2.** EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2) (intro.), Stats.