

**WISCONSIN DEPARTMENT OF HEALTH SERVICES
ORDER TO ADOPT EMERGENCY RULES**

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

The Governor approved the Statement of Scope for this rule, SS 039-20, on May 8, 2020. The Statement of Scope was published in Administrative Register No. 773A2, and was approved by the department on June 6, 2020. This rule was approved by the Governor on May 26, 2021.

FINDING OF EMERGENCY

Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule. 2019 Wis. Act 185 s. 105 (1) (d) (“Act 185”) permits the state, in order to qualify for increased federal funding under s. 6008 of the 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. Many of the provisions of chs. DHS 102, 103, and 109 contain requirements that could result in Medicaid recipients being disenrolled due to circumstances outside their control, such as Medicaid Purchase Plan (MAPP) premiums and work requirements. Disenrollment under these provisions would be inconsistent with the requirements for enhanced federal funding of over \$100M per quarter under the FFCRA. The department has therefore determined that an emergency rule which temporarily suspends certain provisions in chs. DHS 102, 103, and 109 is necessary to maintain continuous Medicaid eligibility and thereby comply with s. 6008 of the FFCRA.

RULE SUMMARY

Statute interpreted

Not applicable

Statutory authority

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 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.

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.

Explanation of agency authority

The department's authority to promulgate the emergency rules is explicitly granted by the Legislature in 2019 Wis. Act 185 s. 105 (1) (a)-(d).

Related statute or rule

The rule succeeds emergency rule 2033 ("EmR2033"), which was effective through May 30, 2021. On April 15, 2021, the U.S. Department of Health and Human Services announced that the public health emergency declaration would be extended for 90 days, effective April 21, 2021.

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)

Plain language analysis

The intent of the emergency rule is to take action permitted under s. 105 (1) (d) of Act 185, and thereby qualify for increased federal funding under s. 6008 of the FFCRA by maintaining continuous Medicaid eligibility for persons enrolled in Medicaid, unless the person leaves the state or requests disenrollment, and not increasing Medicaid premiums during the designated time periods. In order to achieve this goal, certain provisions in chs. DHS 102, 103, and 109 have to be temporarily suspended or amended, as provided in the “Rule Text” section of this order. Additionally, the emergency rule seeks to ensure that individuals are not disenrolled from Medicaid and denied access to necessary treatment during the COVID-19 pandemic.

The rule succeeds EmR2033, which temporarily suspended Medicaid Eligibility provisions in chs. DHS 102, 103, and 109, and was effective through May 30, 2021. On April 15, 2021, the U.S. Department of Health and Human Services announced that the public health emergency declaration would be extended for 90 days, effective April 21, 2021.¹ Accordingly, the FFCRA’s requirements for increased federal funding will remain in effect until the end of the calendar quarter in which the federal public health emergency expires. In order to ensure continued Medicaid eligibility as permitted under Act 185 and to comply with s. 6008 of the FFCRA, a successor emergency rule is required.

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 emergency 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.

Iowa:

Not applicable – The emergency 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 emergency 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 emergency 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 s. 227.24, Stats., and information provided to the department by the Legislative Reference Bureau.

¹ A copy of the Renewal of Determination That a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15April2021.aspx>.

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 and economic impact analysis.

Effect on small business

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

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 102.03 is repealed.

SECTION 2. DHS 102.04 (3) is repealed.

SECTION 3. 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 4. DHS 103.03 (1) (g) 1. and (1) (h) are repealed.

SECTION 5. 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 6. DHS 103.08 (2) (c) 2. is repealed.

SECTION 7. DHS 103.087 (1) (h) is repealed.

SECTION 8. DHS 103.09 (2) and (3) (a), (b) and (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 9. DHS 109.11 (6) is repealed.

SECTION 10. EFFECTIVE DATES. This emergency rule shall take effect upon publication in the official state newspaper, as provided in s. 227.24 (1) (c), Stats., except that Sections 1 to 6, 8, and 9 of this rule order shall remain in effect in effect until the end of the time period provided in ss. 227.24 (1) (c) and (2), Stats., or until the last day of 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), ends, whichever occur sooner.

Section 7 of this rule order shall remain in effect until the end of the time period provided in ss. 227.24 (1) (c) and (2), Stats., unless the end of the emergency period defined in s. 1135 (g) (1) (b) of the Social Security Act, 42 U.S.C. § 1320b-5 (g) (1) (B), ends sooner. If the end of the emergency period occurs first, section 7 shall remain in effect until either the last day of the quarter in which the emergency period ends, or the last day of the calendar month following the month in which the emergency period ends, whichever occurs later.

Wisconsin Department of Health Services

Dated: _____

Karen Timberlake, Secretary-designee

SEAL: