

PROPOSED ORDER OF
THE DEPARTMENT OF HEALTH AND FAMILY SERVICES
CREATING RULES

To create HFS 2, relating to recoupment of program benefit overpayments from program recipients.

Analysis Prepared by the Department of Health and Family Services

Statute interpreted: Sections 16.51 (4), 48.57 (3m) and (3n), 48.62, 48.975, 49.77, 49.775, 49.847, and 49.85, Stats., and other statutes concerning benefits programs administered by the Department.

Statutory authority: Sections 48.57 (3m) (h) and (3n) (h), 48.62 (6), 48.975 (4m), 49.847 and 227.11 (2) (a), Stats.

Explanation of agency authority: The explanation of agency authority can be found in the "Plain language analysis" section of this analysis.

Related statute or rule: Sections 48.57, 48.62, 48.975, 49.77, 49.775, and 49.847, Stats.

Plain language analysis:

The Department proposes to create a new chapter of administrative rules, HFS 2, that addresses recoupment of overpayments made to recipients of benefits paid under chs. 48 and 49, Stats.

The Department of Health and Family Services had relied on its written overpayment policy to authorize the procedure the Department used to recoup benefit payments. In 1999, in Mack vs. DHFS, the Wisconsin Court of Appeals found that although the Department has the right to recover erroneous payment of public funds, the Department could not employ its recoupment process without promulgating the process as an administrative rule. Therefore, the Department proposed to promulgate its procedure for recouping overpayments as ch. HFS 2.

The proposed rules were submitted to the Legislative Council Rules Clearinghouse on September 12, 2003, under the general authority to promulgate rules under s. 227.11 (2) (a), Stats. Since that time, s. 49.847, Stats., was created by 2005 Wisconsin Act 25 and gives explicit legislative authority to recover benefits incorrectly paid under programs administered under ch. 49, Stats., through administrative recoupment. Also in 2005 Wisconsin Act 25, s. 48.57 (3m) (h) and (3n) (h), s. 48.62 (6) and s. 48.975 (4m), Stats., were created to authorize administrative recoupment of kinship care payments, foster care payments, and adoption assistance payments, respectively. The Department is also authorized to specify by rule the methodology for recovering all of these incorrectly paid benefits.

Summary of, and comparison with, existing or proposed federal regulation:

The Department knows of no comparable federal regulations.

Comparison with rules in adjacent states:

Minnesota – The Department was unable to locate any comparable rules in the Minnesota Administrative Code. Requirements for recoupment of overpayment of program benefits, including those under the Family Investment Program and General Assistance Program are stated in Minnesota statute ch. 256. In addition, the Minnesota Department of Human Services maintains

policies and procedures on recoupment of benefit overpayments.

Michigan – Comparable rules from Michigan concerning benefit overpayment recoupment can be found in Mich. Admin. Code R 400.3011, 3131, and 3177. The rules outline criteria for recouping overpaid benefits and allow recoupment from active and inactive recipients groups. Repayment can be made in cash or through benefit reduction. Recoupment may be made because of intentional program violation, client error, or administrative error. The rules also set the maximum amount that can be taken as benefit reductions. An overissuance investigation and administrative hearing precede recoupment resulting from suspected intentional program violations.

Iowa – Comparable rules are found in IAC 441-11. The rules define the Department of Human Services' policies regarding the collection of overpayments in financial assistance and other assistance. The rules outline what information must be maintained for each claim for an overpayment and how the payments are to be applied. The rules also outline the criteria for withholding part or all of federal or state refunds or other state payments owed to the debtor and how they are applied to the debtor's claim for the overpayment and appeal procedures. Subject to the benefit program area, claims for overpayments may be made for agency error, intentional program violations, or recipient error.

Illinois – Comparable rules for Illinois are in 89 Ill. Adm. Code 165. The rules allow the Illinois Department of Human Services to initiate actions to recover overpayment of financial assistance and Food Stamps issued to or on behalf of a client. Actions to recoup overpayments are initiated whether or not a client is currently eligible for financial assistance or Food Stamps. The rules set forth the criteria for determining overpayments; how to establish, terminate, and suspend claims for overpayments; and acceptable forms of payment, including benefit reduction.

Summary of factual data and analytical methodologies:

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, as defined under s. 227.114 (1), Stats. Accordingly, the Department is exempt from performing an analysis of the affect on small businesses by operation of s. 227.114 (8) (b), Stats.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, as defined under s. 227.114 (1), Stats. Accordingly, the Department is exempt from performing an analysis of the affect on small businesses by operation of s. 227.114 (8) (b), Stats.

Anticipated costs incurred by private sector:

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, as defined under s. 227.114 (1), Stats. Accordingly, the Department is exempt from performing an analysis of the affect on small businesses by operation of s. 227.114 (8) (b), Stats.

Effect on small business:

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, defined under s. 227.114 (1), Stats. Accordingly, the

Department is exempt from performing an analysis of the affect on small businesses by operation of s. 227.114 (8) (b), Stats.

Agency contact person:

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Place where comments are to be submitted and deadline for submission:

The comment period for the proposed rules is closed.

Rule Text:

SECTION 1. HFS 2 is created to read:

Chapter HFS 2

Recoupment of Benefit Overpayments

- HFS 2.01 Authority and purpose.**
- HFS 2.02 Applicability.**
- HFS 2.03 Definitions.**
- HFS 2.04 Recovery of incorrectly paid benefits.**
- HFS 2.05 Waiver of recovery.**
- HFS 2.06 Appeal rights.**

HFS 2.01 Authority and purpose. This chapter is promulgated under ss. 48.57 (3m) (h) and (3n) (h), 48.62 (6), 48.975 (4m), 49.847 and 227.11 (2) (a), Stats., to establish procedures for the recovery of incorrectly paid benefits. This chapter interprets ss. 16.51 (4), 48.57 (3m) and (3n), 48.62, 48.975, 49.77, 49.775, 49.847, and 49.85, Stats., and other statutes concerning benefits programs.

HFS 2.02 Applicability. This chapter does not apply to any of the following:

- (1) Payments that are not allowed to be recouped under federal or state laws.
- (2) Persons or entities with whom the department or a county has a contractual relationship where the contract specifies the terms of repayments.

HFS 2.03 Definitions. In this chapter:

(1) “Administrative costs” means an entity’s costs associated with administering the receipt of benefits paid on behalf of an eligible individual and for which a contract between the department a county, or an elected governing body of a federally recognized American Indian tribe and the entity exists specifying the payment of funds to administer the benefit payments on behalf of eligible individuals.

(2) "Department" means the department of health and family services.

(3) "Benefits" means payments made under chs. 48 and 49, Stats., or other benefit programs that provide financial assistance to individuals. Benefits include payments made to a person or entity authorized to receive benefits on behalf of an individual.

(4) "Eligible individual" means an individual for whom benefits are paid.

(5) "Incorrectly paid benefits" means benefits paid for an individual not eligible for any benefits during the period for which the payment was made or paid in an amount in excess of the amount that the individual was eligible to receive.

HFS 2.04 Recovery of incorrectly paid benefits. (1) (a) Subject to applicable law, if the department, a county or an elected governing body of a federally recognized American Indian tribe finds that incorrectly paid benefits under chs. 48 or 49, Stats., have been made, the department, county or elected governing body may seek recovery from the eligible individual or from the person or entity authorized to receive benefits on behalf of the eligible individual or from both. The total amount recovered may not exceed the amount of the incorrectly paid benefits, and shall be offset by any amounts that are owed the eligible individual or the person or entity authorized to receive benefits on behalf of the eligible individual because of a previous underpayment of benefits.

(b) The recovery period for incorrectly paid benefits shall be limited to one year prior to the date that the overpayment is discovered.

(1g) Interest may not be accrued or collected on incorrectly paid benefits.

(1r) Administrative costs may be recouped only from the entity who actually received the incorrectly paid benefits.

(2) If payments for administrative costs are made in addition to the benefits paid to an entity authorized to receive benefits on behalf of an eligible individual, recovery of the administrative costs associated with the incorrectly paid benefits may also be sought from the entity.

(3) Except as provided under s. HFS 2.05, recovery of incorrectly paid benefits from an individual currently eligible to receive benefits may be made by reducing the amount of the individual's benefits by no more than 10% each month until the full amount of the incorrectly paid benefits is recovered, unless the individual requests a larger percentage deduction. A written notice of intent to recover shall be provided to the individual as required under sub. (6).

(4) (a) Except as provided under s. HFS 2.05, recovery of incorrectly paid benefits from an individual who is no longer eligible to receive benefits may be made by sending a notice of intent to recover under sub. (6) requesting the individual to voluntarily repay the amount of the incorrectly paid benefits.

(b) 1. The individual shall repay the amount specified under par. (a) within 30 calendar days after the date of the notice of intent to recover unless the individual appeals as specified under s. HFS 2.06 (2) or makes other payment arrangements. Notice of intent to recover shall be sent by certified mail.

2. If the individual refuses to voluntarily repay the amount specified under par. (a), collection or court action may be taken.

(5) (a) *Recovery of benefits paid to persons or entities that currently receive benefits on behalf of eligible individuals.* If the incorrectly paid benefits were paid to a person or entity that currently receives benefits on behalf of eligible individuals, the amount of the incorrectly paid benefits may be recovered by reducing the amount of the payments currently made to the person or entity by no more than 10% each month until the full amount of incorrectly paid benefits are recovered, unless the person or entity requests a larger percentage deduction.

(b) *Recovery of benefits paid to persons or entities that no longer receive benefits on behalf of eligible individuals.* If a person or entity no longer receives benefits on behalf of eligible individuals, the procedures under sub. (4) may be used to recover the incorrectly paid benefits.

(c) *Notice.* The entity shall be provided written notice of intent to recover under sub. (6), including the entity's right to appeal under ch. HA 1 and ch. 227, Stats.

(6) (a) Except as provided under s. HFS 2.05, no recovery may be made unless at least 20 days prior written notice of the intention to recover some or all of the amount determined to have been overpaid. The notice shall specify all of the following:

1. The months for which benefits were incorrectly paid.
2. The amount of the intended recovery.
3. The amount, if any, by which the amount owed was offset by any applicable previous underpayments of benefits to the individual or entity.
4. A summary of the basis for the finding that incorrectly paid benefits were made.
5. The effective date of the intended action.
6. The right to appeal the intended action as provided in chs. HA 3 and 227, Stats.

(b) The notice under par. (a) shall also include notice of a right to appeal the incorrectly paid benefit determination if a right to appeal that determination was not previously provided.

(7) Other action as authorized by law, including state tax refund setoff, may be used to recover incorrectly paid benefits that are not recovered under the methods provided in this section.

HFS 2.05 Waiver of recovery. Recovery of incorrectly paid benefits may be waived when the recovery of the overpayment is considered to be against equity or when it causes undue hardship, or the recovery impedes efficient and effective administration of programs due to the small amount involved or the age of the account.

HFS 2.06 Appeal rights. (1) ADMINISTRATIVE REVIEW. An action taken under s. HFS 2.04 (1) or (2) is subject to review under ch. 227, Stats., and ch. HA 3.

(2) REQUEST FOR HEARING ON RECOVERY ACTION. (a) If an individual or entity chooses to contest a proposed recovery under s. HFS 2.04, the individual or entity shall, within 45 calendar days after receipt of the notice of intent to recover, submit a written request for a hearing on the matter to the department of administration's division of hearings and appeals. The request shall briefly identify the basis for contesting the proposed recovery. The date of service of a recipient's request for a hearing shall be the date on which the department of administration's

division of hearings and appeals receives the request. A request by facsimile is complete upon transmission. If the request is filed by facsimile transmission and such transmission is completed between 5 P.M. and midnight, one day shall be added to the prescribed period. If the hearing request is filed prior to the effective date of the proposed recovery, the Division shall order the action be stayed and benefits unchanged pending the hearing decision.

Note: A hearing request should be addressed to the Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707. Hearing requests may be delivered in person to that office at 5005 University Avenue, Room 201, Madison, WI. Hearing requests may be faxed to 608-264-9885.

(b) If a timely request for hearing is not received, the amounts as specified under s. HFS 2.04 (1) or (2) may be recovered.

(3) HEARINGS. The division of hearings and appeals shall hold an administrative hearing under ch. HA 3.

SECTION 2. Chapter HFS 79 is repealed.

SECTION 3. 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.

Wisconsin Department of Health and
Family Services

Dated: May 22, 2006

By: _____
Helene Nelson
Secretary

SEAL: