

Clearinghouse Rule 16-087

PROPOSED ORDER OF DEPARTMENT OF HEALTH SERVICES TO ADOPT PERMANENT RULES

The Wisconsin Department of Health Services (department) proposes an order **to amend** DHS 124.28 (2), DHS 131.38 (2), DHS 132.82 (1), and DHS 134.82 (1) of the Wisconsin Administrative Code, relating to hospitals, hospices, nursing homes and facilities serving people with developmental disabilities.

RULE SUMMARY

Statute interpreted

Sections 50.02 (2) (a), 50.03 (3), 50.36 (1), 50.49 (2) (a), 50.95 (1), 227.11 (2) (a), Stats.

Statutory authority

Sections 50.02 (2), 50.03 (3), 50.36 (1), 50.49 (2) (a), 50.95 (1), 227.11 (2) (a), Stats.

Explanation of agency authority

The department's authority to promulgate rules is as follows:

Section 50.02 (2) (a), Stats., states:

The department, by rule, shall develop, establish and enforce regulations and standards for the care, treatment, health, safety, rights, welfare and comfort of residents in community-based residential facilities and nursing homes and for the construction, general hygiene, maintenance and operation of those facilities which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of residents in those facilities; and promulgate and enforce rules consistent with this section. Such standards and rules shall provide that intermediate care facilities, which have 16 or fewer beds, may, if exempted from meeting certain physical plant, staffing and other requirements of the federal regulations, be exempted from meeting the corresponding provisions of the department's standards and rules. The department shall consult with the department of safety and professional services when developing exemptions relating to physical plant requirements.

Section 50.02 (3), Stats., states:

(a) The department shall establish several levels and types of community-based residential facilities and nursing homes as provided in par. (b), including a category or categories designed to enable facilities to qualify for federal funds.

(b) In setting standards and regulations, the department shall consider the residents' needs and abilities, the increased cost in relation to proposed benefits to be received, the services to be provided by the facility, the relationship between the physical structure and the objectives of the program conducted in the facility and the primary functions of the facility. Recognizing that size

and structure will influence the ability of community-based residential facilities to provide a homelike environment, the legislature encourages the department to develop rules which facilitate in particular the development of: small facilities, small living units in larger facilities, individual residential units, independent living to the extent possible, and integration of residents into the community.

(c) The department shall promulgate rules to establish a procedure for waiver of and variance from standards developed under this section. The department may limit the duration of the waiver or variance.

(d) The department shall promulgate rules to establish a procedure for the admission, evaluation and care of short-term care nursing home residents. These rules shall specify that the nursing home or community-based residential facility shall be required to provide to the department as documentation of this admission, evaluation and care only that amount of information commensurate with the length of stay and the medical needs, if any, of the particular resident.

Section 50.36 (1), Stats., states:

The department may use and enforce the conditions in [42 CFR 482.60](#) as standards that apply to psychiatric hospitals, which are hospitals primarily engaged in providing psychiatric services for the diagnosis and treatment of persons who have mental illness. Beginning on July 1, 2016, except as otherwise provided under ss. [50.32](#) to [50.39](#), the department shall use and enforce the conditions for Medicare participation for hospitals as the minimum standards that apply to hospitals. The department shall interpret the conditions for Medicare participation for hospitals using guidelines adopted by the federal centers for medicare and medicaid services, unless the department determines that a different interpretation is reasonably necessary to protect public health and safety. The department may promulgate, adopt, amend, and enforce additional rules and standards for the construction, maintenance, and operation of hospitals that the department determines are necessary to provide safe and adequate care and treatment of hospital patients and to protect the health and safety of the patients and employees. The building codes and construction standards of the department of safety and professional services shall apply to all hospitals to the extent that they are not incompatible with any building codes or construction standards required by the conditions for Medicare participation for hospitals. Except for the construction codes and standards of the department of safety and professional services and except as provided in s. [50.39 \(3\)](#), the department shall be the sole agency to adopt and enforce rules and standards pertaining to hospitals.

Section 50.95 (1), Stats., states:

The department shall promulgate all of the following rules:

(1) Except as provided in s. [50.942](#), standards for the care, treatment, health, safety, rights, welfare and comfort of individuals with terminal illness, their families and other individuals who receive palliative care or supportive care from a hospice and the maintenance, general hygiene and operation of a hospice, which will permit the use of advancing knowledge to promote safe and adequate care and treatment for these individuals. These standards shall permit provision of

services directly, as required under [42 CFR 418.56](#), or by contract under which overall coordination of hospice services is maintained by hospice staff members and the hospice retains the responsibility for planning and coordination of hospice services and care on behalf of a hospice client and his or her family, if any.

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

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 on the agency the 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.

Related statute or rule

See the “Statutes interpreted” and “Statutory authority” sections.

Plain language analysis

On May 4, 2016, the federal Centers for Medicare & Medicaid (CMS) adopted the 2012 Life Safety Code (LSC) by final rule. The LSC is published and periodically revised by the National Fire Protection Association (NFPA), which was founded in 1896 to promote the science and improve the methods of fire protection. The LSC establishes fire protection requirements that address construction, protection, and operational features, and that are intended to provide a reasonable degree of safety from fire, smoke, and panic.

All federally-certified health care providers must comply with the 2012 LSC within 60 days of the publication date of the final rule, unless otherwise stated in the rule. Affected providers in Wisconsin include federally-certified hospitals, hospices, nursing homes and facilities serving people with developmental disabilities. These providers are also regulated by Chapters DHS 124, DHS 131, DHS 132, and DHS 134, which currently adopt the 2000 edition of the LSC. The department therefore proposes to adopt the 2012 edition of the LSC in these chapters, in order to promote safe and adequate care for patients and residents in Wisconsin health care facilities, and to achieve consistency between federal and state rules.

There are no reasonable policy alternatives because all federally-certified hospitals, hospices, nursing homes and facilities serving people with developmental disabilities must comply with the 2012 Life Safety Code. If state rules are not updated, affected providers will be subject to inconsistent requirements, and fire protections for patients and residents in Wisconsin health care facilities will remain outdated.

Entities that may be affected by the proposed rule revisions are hospitals, hospices, nursing homes and facilities serving people with developmental disabilities, health care providers receiving residents or patients from these providers, and consumers of these providers and their representative.

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

All searches conducted October 2016.

Effective May 4, 2016, CMS adopted the 2012 edition of the LSC to modernize and improve protection from fire. The adopted federal rule applies to all federally certified hospitals, hospices, nursing homes and facilities serving people with developmental disabilities in Wisconsin.

Comparison with rules in adjacent states

Illinois:

Effective May 4, 2016, all federally certified hospitals, hospices, nursing homes and intermediate care facilities for individuals with intellectual disabilities must comply with the 2012 edition of the LSC.

Iowa:

Effective May 4, 2016, all federally certified hospitals, hospices, nursing homes and intermediate care facilities for individuals with intellectual disabilities must comply with the 2012 edition of the LSC.

Michigan:

Effective May 4, 2016, all federally certified hospitals, hospices, nursing homes and intermediate care facilities for individuals with intellectual disabilities must comply with the 2012 edition of the LSC.

Minnesota:

Effective May 4, 2016, all federally certified hospitals, hospices, nursing homes and intermediate care facilities for individuals with intellectual disabilities must comply with the 2012 edition of the LSC.

Summary of factual data and analytical methodologies

The department relied on the following sources to draft the proposed rule and to determine the impact on home health agencies.

- The 2012 Economic Census – Wisconsin Geographic Series, compiled by the U.S. census bureau every 5 years for each year ending in “2” and “7” and contains the latest available economic data compiled on businesses located in Wisconsin.
- Criteria adopted by the department and approved by the Wisconsin Small Business Regulatory Review Board to determine whether the department’s proposed rules have a significant economic impact on a substantial number of small businesses. Pursuant to the department’s criteria, a proposed rule will have a significant economic impact on a substantial number of small businesses if at least 10% of the businesses affected by the proposed rules are small businesses and if operating expenditures, including annualized capital expenditures, increase by more than the prior year’s consumer price index or reduces revenues by more than the prior year’s consumer price index. For the purposes of this rulemaking, 2016 is the index year. The consumer price index is compiled by the U.S. Department of Labor, Bureau of Labor Statistics. The rate for hospital services is 6.0 percent. The rate for hospice, nursing home and facilities serving people with developmental disabilities is 3.7 percent.
- DHS databases including the ASPEN Information System which contains demographic, licensing, program, and compliance history of all hospitals, hospices, nursing homes and facilities serving people with developmental disabilities in Wisconsin.
- Data reported in the department’s, Division of Public Health, Bureau of Health Information Policy publication, *Wisconsin Home Health Agencies and Patients*, 2005, (PPH 5354-05) February 2007.

Analysis and supporting documents used to determine effect on small business

All hospitals, hospices, nursing homes and facilities serving people with developmental disabilities are subject to chs. DHS 124, DHS 131, DHS 132, DHS 134, and ch. 50, Stats. If a health care provider participates as a provider in the Medicaid and Medicare programs, the health care provider is also subject to 42 CFR 482 for hospitals, 42 CFR 418 for hospices and 42 CFR 483 for nursing homes and facilities serving people with developmental disabilities. The department determined that hospitals, nursing homes and facilities serving people with developmental disabilities are not considered small businesses. However, there are 21 hospices in Wisconsin that provide in-patient care and would be subject to this proposed rule. The department determined that 3, or 14 %, of these hospices may be considered small businesses. In addition, pursuant to s. 227.114 (2), Stats., the department considered the methods for reducing the impact of proposed rule revisions on small businesses. The department believes that proposed rule revisions will result in simplified and consistent compliance with the requirements.

Effect on small business

Based on the foregoing analysis, the rules are anticipated to have little to no economic impact on small businesses.

Statement on quality of agency data

The data sources used to draft the rules and analyses are accurate, reliable and objective and are listed in the Summary of Factual Data and Analytical Methodologies section of this rule order.

Agency contact person

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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 deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin State Legislature's Administrative Rules website <http://docs.legis.wisconsin.gov/code>.

RULE TEXT

SECTION 1. DHS 124.28 (2) is amended to read:

DHS 124.28 (2) LIFE SAFETY CODE. Facilities shall meet the applicable provisions of the 2012 ~~2000~~-edition of the Life Safety Code (LSC).

SECTION 2. DHS 131.38 (2) is amended to read:

DHS 131.38 (2) LIFE SAFETY CODE. Facilities shall meet the applicable provisions of the 2012 ~~2000~~-edition of the Life Safety Code (LSC).

SECTION 3. DHS 132.82 (1) is amended to read:

DHS 132.82 (1) APPLICABILITY. Facilities shall meet the applicable provisions of the 2012 ~~2000~~ edition of the life safety code.

SECTION 4. DHS 134.82 (1) is amended to read:

DHS 134.82 (1) APPLICABILITY. Facilities shall meet the applicable provisions of the 2012 ~~2000~~ edition of the life safety code.

SECTION 5. EFFECTIVE DATE: These rules shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2), Wis. Stats.