Report From Agency

RULEMAKING REPORT TO LEGISLATURE

CLEARINGHOUSE RULE 23-045

Chs. DHS 10, 101, 105, 106, and 107, relating to electronic visit verification (EVV) requirements for certain Medical Assistance services.

Basis and Purpose of Proposed Rule

Section 12006(a) of the federal Cures Act amended section 1903 of the Social Security Act, 42 USC 1396b, and established requirements that state Medical Assistance programs utilize an electronic visit verification ("EVV") system for personal care and home health services. The Cures Act further provides that states who fail to implement EVV for these services by a certain date are subject to a reduction in the federal medical assistance percentage in increasing amounts as years of noncompliance increase. See 42 USC 1396b (l) (1) (a) and (B).

Consistent with the state's obligation to administer MA—and, more specifically to "[c]ooperate with the federal authorities for the purpose of providing the assistance and services available under Title XIX to obtain the best financial reimbursement available to the state from federal funds" under s. 49.46 (2) (a) 7., Stats.—the department has determined that rules are necessary under s. 49.45 (10), Stats., to comply with the EVV requirements created by the Cures Act. The proposed rules will (1) create requirements for providers seeking reimbursement for home health and personal care services to provide requisite EVV data, and (2) establish enforcement mechanisms for these requirements.

Department Response to Legislative Council Rules Clearinghouse Recommendations

The department accepts the recommendation(s) made by the Legislative Council Rules Clearinghouse and has modified the proposed rules where suggested except as follows:

Comment 5.c. - The department did not make any edits based on the feedback on section 2 of the proposed ruler order. Section 2 is stipulating our expectation for managed care entities (specifically Family Care) to comply with EVV – our expectation for health maintenance organizations (HMO) and managed care organizations (MCO) is not the same as our expectation for providers. MCOs have the authority to deny provider claims with missing EVV data, and encounters they submit to the department without matching EVV data may be excluded from future capitation rate setting development. The HMOs/MCOs are aware of this expectation and understand what "complying with EVV requirements" entails.

Final Regulatory Flexibility Analysis

The issues raised by each small business during the public hearing(s):

-Capture and retain records - how to capture and how long to retain are unclear.
-Outage guidance needed - define outage and how outages are communicated.
-Statutory authority in the explanation of agency authority section should say claims *may* be denied instead of *will* be denied
-Financial strain of implementing these requirements.

Any changes in the rule as a result of an alternative suggested by a small business and the reasons for rejecting any of those alternatives:

-The Department updated the language in the explanation of agency authority with respect to s. 49.46(2)(b), Stats., to state that claims 'may' be denied.
-All other concerns will be addressed in ForwardHealth guidance.

The nature of any reports and estimated cost of their preparation by small businesses that must comply with the rule:

Not applicable – no update to costs because the Department will provide an EVV system and comprehensive training to all agencies and workers at no added cost.

The nature and estimated costs of other measures and investments that will be required by small businesses in complying with the rule:

Not applicable – no update to costs because the Department's EVV customer care team is offering personalized support for all administrators and workers during any step of the EVV process at no charge.

The reason for including or not including in the proposed rule any of the following methods for reducing the rule's impact on small businesses, including additional cost, if any, to the department for administering or enforcing a rule which includes methods for reducing the rule's impact on small businesses and the impact on public health, safety and welfare, if any, caused by including methods in rules

The proposed rule consolidated and simplified compliance for reporting requirements for small businesses.

Changes to the Rule Analysis or Fiscal Estimate/Economic Impact Analysis

Rule Analysis:

No changes were made to the rule's analysis or fiscal estimate/economic impact analysis.

Fiscal Estimate/Economic Impact Analysis:

No changes were made to the rule's analysis or fiscal estimate/economic impact analysis.

Public Hearing Summary

The department began accepting public comments on the proposed rule via the Wisconsin Legislature Administrative Rules website, and the Department's Administrative Rules Website on 8/31/2023. A public hearing was held on 9/7/2023, virtually. Public comments on the proposed rule were accepted until 9/8/2023.

List of the persons who appeared or registered for or against the Proposed Rule at the Public Hearing.

Registrant	**Position Taken** (Support or Opposed)
Christie Daniels, Independence First	Supportive of Changes
Dottie Hughes, Compassionate Care	Opposed

Summary of Public Comments to the Proposed Rule and the Agency's response to those comments, and an explanation of any modification made in the proposed rule as a result of public comments or testimony received at the Public Hearing.

Rule Provision	Public Comment	Department Response
Section 7; Section 8 DHS 106.03 (2m) DHS 107.02(1)(am)	Wisconsin Personal Services Association, Inc. (WPSA) is incredibly concerned by language that appears in the explanation of agency authority section of the draft rule document, which definitively states "claims that are not matched to requisite EVV data will be denied." Further, the draft rule text in DHS 106.03(2m) and DHS 107.02(1)(am), which state that "claims that require EVV that are not matched to an EVV record may be denied." The federal 21st Century Cures Act, which created EVV, and this draft rule seeks to implement, requires states to use EVV and says that states may be penalized for non-compliance with the requirement to use EVV. However, to our knowledge, the law does not require that providers not be reimbursed for any claim that fails to match EVV records. This draft rule appears to go beyond implementing the federal 21st Century Cures Act requirements for EVV. WPSA is concerned that this language signals an intent to establish a "perfection standard" related to agency implementation of EVV. We urge DHS to consider that personal care services may have been provided consistent with physician orders even where there are inconsistencies between the claim and the EVV record. Hence, we ask that DHS establish reimbursement policies and enforcement standards consistent with this reality and that allow for corrections and corrective action plans	Wisconsin must comply with the provisions of the 21st Century Cures Act, which requires implementation of EVV requirement to verify the provision of personal care and home health services. Wisconsin must also comply with the CMS guidance, indicated in numerous public settings and is available on the CMS website, which was established to verify compliance with EVV. In order for Wisconsin to certify our EVV system with CMS, a matching EVV visit for every claim that requires EVV is necessary. If Wisconsin fails to meet this standard, Federal Medical Assistance Percentage (FMAP) could be reduced, and implementation assistance funds withdrawn.
N/A - suggested addition	WPSA recommends that clarity be added to the draft DHS 105.16(1m), DHS 105.17(1g)(cm) and DHS 105.19(7m), which require providers to "to capture and retain EVV records." It is unclear from this language how long DHS wants agencies to retain these records. Further considerations need to be made for the verbiage that require providers to "to capture and retain EVV records." The current verbiage does not give specific guidance for length of time, method of storage, or archival of said records.	Record maintenance expectations are documented in other sections of the administrative code. Providers may reference s. DHS 106.02(9) for record-keeping expectations.
N/A - suggested addition	WPSA is concerned by the uneven regulatory environment that currently exists between IRIS and other Medicaid programs. The draft EVV rule appears to exacerbate this issue by leaving out administrative rules for the IRIS program. The draft rule includes EVV rules for Family Care, general Medicaid, home health providers, personal care providers and nurses in independent practice. No regulations are issued for IRIS. WPSA urges DHS to enforce EVV consistently between Medicaid programs.	The IRIS program is a HCBS waiver program under s. 1915(c) of the Social Security Act. EVV is enforced in IRIS according to the program's HCBS waiver, IRIS EVV Policy, and the IRIS Provider Agreement with IRIS Consultant Agencies and Fiscal Employer Agencies. Adding EVV language in administrative code for IRIS would also require the creation of broader definitions and components for the IRIS program, which would exceed the statement of scope for the proposed rule.

N/A - suggested addition	The administrative rule does not currently provide guidance on EVV outages. In the event of a vendor outage or outage due to natural disaster EVV information would not be in the aggregator which under the proposed rule would require payors to deny reimbursement. We ask that additional verbiage is added to accommodate outages. This verbiage will need to define what an outage is. How agencies should handle EVV during that time, how this is tracked, how it can be submitted for reimbursement to payors. What the payor and Agency responsibility is during outages. How outages should be communicated. What is the recourse if there be issues with the data provided to payors for reimbursement. The outage protocol will need to be inclusive of both the state provided system, and ALT EVVs who use the system as an electronic record of care.	Outage exceptions are addressed in Forward Health guidance – not in administrative code.
Explanation of Agency Authority	Section 49.46 (2)(b), Stats., summarized the authority of the departments proposed rules because claims that are not matched to requisite EVV data will be denied. We would ask that the verbiage of WILL be denied is changed to CAN BE denied. Agencies should have the opportunity to correct human errors.	We have changed "will" in the explanation of agency authority section, in which we describe 49.46 (2) (b),to "may" to reflect the flexibilities built into EVV policy.
Explanation of Agency Authority	Section 49.47 (6) (a), Stats., summarizes the department's authority to audit and pay charges to providers. The department will apply this authority in to enforce the proposed EVV rules by denying claims that are not matched to the requisite EVV data. We believe that this is out of scope of the 21st Century Cures act. We would ask that this verbiage is removed entirely. If the state feels that it cannot be removed, we would ask that it is updated to include that claims can be denied with the ability to resubmit for full reimbursement within a specified period of time. This will give agencies the ability to course correct so that they are able to limit billing issues in the future.	Wisconsin must comply with the provisions of the 21st Century Cures Act. Wisconsin must also comply with the CMS guidance established to verify compliance with EVV. In order for Wisconsin to certify our EVV system with CMS, a matching EVV visit for every claim that requires EVV is necessary. If Wisconsin fails to meet this standard, FMAP could be reduced, and implementation assistance funds withdrawn. Under s. DHS 106.03(3), providers currently have 365 days after the date of service to correct and resubmit claims, and this flexibility extends to claims with EVV as well. If a claim is submitted without all requisite EVV and denied, the provider has 365 days after the date of service to correct the EVV and resubmit the claim.

Summary of Items Submitted with this Report to the Legislature

Below is a checklist of the items that are attached to or included in this report to the legislature under s. 227.19 (3), Stats.

Documents/Information	Included in Report	Attached	Not Applicable
Final proposed rule -- Rule Summary and Rule Text		X	
Department response to Rules Clearinghouse recommendations	X		
Final Regulatory Flexibility Analysis		X	
Changes to the Analysis or Fiscal Estimate/Economic Impact Analysis			X
Public Hearing Summary	X		
List of Public Hearing Attendees and Commenters	X		
Summary of Public Comments and Department Responses	X		
Fiscal Estimate/Economic Impact Analysis		X	
Revised Fiscal Estimate/Economic Impact Analysis			X
Small Business Regulatory Review Board (SBRRB) statement, suggested changes, or other material, and reports made under s. 227.14 (2g), Stats. and Department's response			X
Department of Administration (DOA) report under s. 227.115 (2), Stats., on rules affecting housing			X
DOA report under s. 227.137 (6), Stats., on rules with economic impact of $20 MM or more			X
Public Safety Commission (PSC) energy impact report under s. 227.117 (2), Stats. and the Department's response, including a description of changes made to the rule			X