

**REVISED STATEMENT OF SCOPE
WISCONSIN DEPARTMENT OF HEALTH SERVICES**

CHAPTER: DHS 102, 103 and 109
RELATING TO: Medicaid eligibility requirements
RULE TYPE: Permanent and emergency
SCOPE TYPE: Revised - this statement of scope modifies SS 039-20, which was approved by the Governor on May 8, 2020, published in Register 773A2 on May 11, 2020, and approved by the Secretary of the Department of Health Services (“the Department”) on June 3, 2020, relating to Medicaid eligibility requirements. This revised statement of scope seeks to promulgate a permanent rule in addition to an emergency rule.
EMERGENCY: Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule. 2019 Wis. Act 185 s. 105 (1) (d) permits the state, in order to qualify for increased federal funding under s. 6008 of the Families First Coronavirus Response Act (“the FFCRA”), Pub. L. No. 116-127, to maintain continuous Medicaid eligibility for persons enrolled in Medicaid (unless the person leaves the state or requests disenrollment) during the federal emergency period declared in response to the COVID-19 pandemic. 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 premiums. Disenrollment under these provisions would be inconsistent with the requirements of the FFCRA—which would result in the loss of enhanced federal funding of about \$150 million per quarter.

SUMMARY

1. Description of rule objectives

The intent of the rule is to take action permitted under s. 105 (1) of 2019 Wis. Act 185 (“Act 185”), and thereby qualify for increased federal funding under s. 6008 of the FFCRA. Section 6008 of FFCRA provides a temporary 6.2 percentage point federal medical assistance percentage (“FMAP”) increase to each state that maintains continuous eligibility for persons enrolled in Medicaid (unless the person leaves the state or requests disenrollment) and does not increase Medicaid premiums during the federal emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320-5(g), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic. The increased FMAP provided to the state under the FFCRA amounts to approximately \$150 million per quarter.

On April 17, 2020, Act 185 became effective. Section 105 (1) of Act 185 provided that, in order to comply with section 6008 of the FFCRA and obtain an enhanced medical assistance percentage from the federal government, the state may suspend certain Medicaid requirements and maintain continuous Medicaid eligibility for those who were enrolled on March 18, 2020 or later, unless that person requested disenrollment or lost state residency.

The first federal emergency declaration took effect in January 2020.¹ That declaration has been renewed several times, and the public health emergency remains in effect through July 2021.² In a letter to governors, the United States Secretary of Health and Human Services represented that the federal public health emergency will likely

¹ A copy of the original Determination that a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

² A copy of the April 2021 Renewal of Determination That a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15April2021.aspx>.

remain in place for the entirety of 2021.³ As vaccination rates across the country slow down,⁴ it is possible that the federal emergency could be extended into 2022.

Several measures have been taken in accordance with Act 185 in order to comply with s. 6008 of FFCRA. In May 2020, Governor Evers and then-Department-Secretary-designee Palm issued Emergency Order 35, which ordered the suspension of a number of administrative rules which contained requirements that could result in Medicaid recipients being disenrolled during the federal emergency public health emergency. The Governor's public health emergency subsequently expired, which effectively nullified Emergency Order 35. Following the expiration of Emergency Order 35, the Department, in accordance with s. 227.24, Stats., promulgated emergency rule 2033 ("EmR2033"), which suspended provisions in chs. DHS 102, 103, and 109 in order to comply with s. 6008 of FFCRA. EmR2033 was extended for the maximum 120 days allowed under s. 227.24 (2), Stats., and it expired on May 30, 2021. The Governor approved a successor emergency rule to EmR2033 on May 26, 2021, and that rule was published and took effect in accordance with s. 227.24 (1) (c), Stats., on June 5, 2021.

In order to continue complying with section 6008 of the FFCRA and to receive approximately \$150 million in federal funding per quarter, the Department has determined that, in light of the ongoing need to suspend rule provisions to comply with s. 6008 of the FFCRA, permanent rules that supplant the emergency rule currently in effect and temporarily suspend certain Medicaid eligibility provisions are necessary so that the Department maintains continuous enrollment in Medicaid during the declared emergency period. The permanent rule will create sunset provisions that seek to amend or create provisions in chs. DHS 102, 103 and 109 specific to maintaining continuous Medicaid enrollment, and then repeal those provisions after end of the federal public health emergency.

2. Existing policies relevant to the rule and policies proposed to be included in the rule

Strict compliance with the current rules could result in many recipients of Medicaid programs losing coverage for failing to verify or meet various requirements related to finances, payment of premiums, or asset spend-down. This result would be inconsistent with Act 185, which permits the state to maintain "continuous enrollment" in Medicaid in order to comply with section 6008 of the FFCRA. This rule therefore proposes to temporarily suspend these rule provisions in order to comply with the FFCRA.

3. Analysis of policy alternatives

As explained in section 1, there are no reasonable alternatives to rulemaking.

4. Statutory authority for the rule

a. Explanation of authority to promulgate the proposed rule

The Department is authorized to promulgate the rule based upon explicit statutory language.

b. Statute/s that authorize/s the promulgation of the proposed rule

The Department is authorized to promulgate the emergency rule based upon the following statutory sections:

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

³ A copy of this letter is available at <https://ccf.georgetown.edu/wp-content/uploads/2021/01/Public-Health-Emergency-Message-to-Governors.pdf>

⁴ As of June 3, 2021, the 7-day average number of administered vaccines reported to the CDC per day decreased by 38% from the previous week. See *Covid Data Tracker: Trends in Number of COVID-19 Vaccinations in the US*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#vaccination-trends> (last visited June 8, 2021).

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 49.45 (10), Stats: RULE-MAKING POWERS AND DUTIES. The department is authorized to promulgate such rules as are consistent with its duties in administering medical assistance. The department shall promulgate a rule defining the term "part-time intermittent care" for the purpose of s. 49.46.

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.

c. Statute/s or rule/s that will affect the proposed rule or be affected by it

Section 49.46 (1), Stats.
Section 49.46 (1) (c) & (cg), Stats.
Section 49.47(4) (b) & (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.

5. Estimates of the amount of time that state employees will spend to develop the rule and other necessary resources

The estimated time for state employees to develop the rule is 100 hours.

6. Description of all of the entities that may be affected by the emergency rule, including any local governmental units, businesses, economic sectors, or public utility rate payers who may reasonably be anticipated to be affected by the rule

This requested suspension of Medical Assistance rules will affect the work done by County and Tribal human services agencies administering the Medicaid and Children's Health Insurance Program (CHIP) programs by increasing their recipient caseloads. It will also affect medical providers by decreasing the number of uninsured patients.

7. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule

42 CFR § 435.952(c)(3) Requires that self-attestation for all eligibility criteria be accepted when documentation is not reasonably available to the individual during a natural disaster.

The suspension of Medical Assistance rules is needed to comply with conditions spelled out by section 6008(b) of the FFCRA in order for Wisconsin to qualify for an increase in federal match of 6.2 percentage points for the Medicaid and CHIP programs for the duration of the federal public health emergency. These requirements include a prohibition of the termination or reduction of benefits for any person who was receiving Medicaid on March 18, 2020, and for any person who is determined eligible for Medicaid on or after March 18, 2020, lasting through the end of the month following the end of the emergency period declared by the Secretary of the Department of Health and Human Services.

8. Anticipated economic impact, locally or statewide

The proposed rule will have minimal or no economic impact.

9. Agency contacts

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