

**Publication Date:** December 16, 2009

**Effective Dates:** December 16, 2009 through May 14, 2010

**DEPARTMENT OF HEALTH SERVICES  
ADOPTING EMERGENCY RULES**

The Wisconsin Department of Health Services hereby adopts emergency rules to **repeal** DHS 105.17 (1) (L), (3) (a) 4., and (4) (g); **to renumber and amend** DHS 105.17 (1) (intro.), (a) to (k) and (m) to (t), and 105.17 (4) (intro.), (a) to (f), (h), and (i); **to amend** DHS 105.01 (6), 105.17 (2) (a) (intro.), 1. and 2., (b) (intro.), 2. to 6., (3) (a) 1. and 3., (b) 1. to 4., (4) (title), and DHS 133.02 (5m) (c); **to repeal and recreate** DHS 105.17 (2) (a) 3.; **and to create** DHS 105.17 (1), (1w) (title), (intro.), and (a) to (c), (d) 4., (f), (g), and (h) Note, (1e) (title), (intro.) and (e), (1g) (title) and (intro.), (1n) (a) 2. and 3., and (1r) (a) to (c), (2) (b) 3m., (3) (b) 5., (4) (a) 2., (b), and (c), and (5), 106.06 (4m), and 133.02 (5m) (d), relating to personal care agencies and providers, and affecting small businesses.

**EXEMPTION FROM FINDING OF EMERGENCY**

The legislature by 2009 Act 28, SECTION 9122. sub. (2) provides an exemption from a finding of emergency to adopt these emergency rules.

**SUMMARY OF EMERGENCY RULES**

**Statute interpreted:** Sections 49.45 (42) (c) and (d) 3., Stats.

**Statutory authority:** Sections 49.45 (2) (a) 11., (10) and (42) and 227.11 (2), Stats.

**Explanation of agency authority:**

Section 49.45 (2) (a) 11., Stats., authorizes the department to establish criteria for certification of providers of Medical Assistance, certify providers who meet certification criteria and promulgate rules to implement the statute.

Section 49.45 (10), Stats., authorizes the department to promulgate rules consistent with its duties in administering Medical Assistance, including its duties relating to reimbursement for personal care services by certified providers.

Section 49.45 (42) (c), Stats., allows the department to charge a fee to certify a provider of personal care services that is not an independent living center (ILC), county department, a federally recognized American Indian tribe or band in Wisconsin or a licensed home health agency.

Section 227.11 (2) (a), Stats., allows agencies to promulgate rules interpreting the provision of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

**Related statute or rule:**

DHS chs. 101, 106, and 107.

**Plain language analysis:**

The department proposes standards by which to certify freestanding personal care agencies, county departments, home health agencies, federally recognized American Indian tribe or band in Wisconsin, and ILCs as personal care providers. The proposed rules includes certification requirements for persons that want to directly bill and be reimbursed by the Medical Assistance program for the personal care services provided to recipients of Medical Assistance. The rules include new provisions that all personal care providers must follow. The new provisions are:

- Provide employee orientation, evaluation and health screening, including tuberculosis.
- Train staff regarding infection control and prevention.
- Provide client rights, including determination of client appropriateness for service, provisions of rights and notice of how to file a complaint with the department.
- Require a service agreement and a notice and criteria for discharge.
- Promptly notify the physician of a significant change in condition.

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

Section 440.167 of 42 CFR contains the requirements for providing personal care services to Medicaid recipients. Section 440.167 does not provide detail on the types of agencies which are allowed to provide personal care services or to directly bill the Medicaid program for reimbursement.

### **Comparison with rules in adjacent states:**

**Illinois:** Wisconsin offers personal care as an optional Medicaid state plan service, but Illinois does not. Illinois does offer some types of personal care services under waivers.

**Iowa:** Wisconsin offers personal care as an optional Medicaid state plan service, but Iowa does not. Iowa does offer some types of personal care services under waivers.

**Michigan:** Both Michigan and Wisconsin offer personal care as an optional Medicaid state plan service.

Michigan is one of only 2 states nationwide (the other is New Jersey) that covers assistive devices or equipment under the PCS benefit. Nationwide, 17 of the 25 states that offer personal care services (71%) allow some kind of consumer direction for the PCS benefit. Michigan allows it to some extent (as does Minnesota). Wisconsin very recently began offering a self-directed personal care option on a very limited basis to participants in the self-directed program known as IRIS (Include, Respect, I Self-Direct).

Wisconsin is in the middle of the 3 states in the region terms of the settings where the personal care services benefit may be provided. Michigan is more restrictive than Wisconsin, as the service may only be provided in the home. In Wisconsin, the services may be provided in the home or in community-based residential setting in facilities of 20 beds or less.

Minnesota is the most stringent of the 3 states in terms of who may authorize the use of personal care services. Minnesota requires a statement of medical need from a physician and an assessment as to need by a public health nurse. In Michigan, physicians, social workers, case managers, physician assistants, and nurse practitioners may all authorize personal care services. Wisconsin only allows personal care services when authorized by a physician.

**Minnesota:** Both Minnesota and Wisconsin offer personal care as an optional Medicaid state plan service.

Wisconsin is in the middle of the 3 states in terms of the settings where the personal care services benefit may be provided. In Wisconsin, the services may be provided in the home or in community-based residential setting in facilities of 20 beds or less. Minnesota provides the service in the home, in community-based residential settings, in schools, and in the workplace.

### **Summary of factual data and analytical methodologies:**

The department relied on all of the following sources to determine the impact on small businesses, specifically personal care agencies to draft the rules:

1. The Department met with the Home Care Advisory Committee (HCAC) and reviewed the initial draft of the rule. This committee is composed of representatives of the Wisconsin Personal Services Association (WPSA), Wisconsin Homecare Organization (WHO), Professional Homecare Providers (PHP), subcontracted personal care agencies, ILCs, home health agencies, counties, and representatives from the Homecare Consumer Advisory Committee. Representatives from these organizations were provided a copy of the initial draft of the rule and asked for comments. The initial draft of the rule was also sent to counties and ILCs for comment.
2. The 2002 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 (2007 data is not yet published-October 2009) compiled on businesses located in Wisconsin.
3. Criteria adopted by the Department and approved by the Wisconsin Small Business Regulatory Review Board to determine whether the Department’s rules have a significant economic impact on a substantial number of small businesses. Pursuant to the Department’s criteria, a rule will have a significant economic impact on a substantial number of small businesses if at least 10% of the businesses affected by the 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, 2008 is the index year. The consumer price index is compiled by the U.S. Department of Labor, Bureau of Labor Statistics; the preliminary rate for the Midwest in 2008 is currently estimated at 3.9 percent.

4. Section 227.114 (1) (a), Wisconsin Stats. defines "small business" as a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employs 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000.

**Analysis and supporting documents used to determine effect on small business:**

The North American Industry Classification System (NAICS) includes personal care agencies in the Health Care and Social Assistance sector, (sector 62) and further defined in sub-sector 6216 home health agencies (home based services). This industry sector comprises establishments primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupation and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy. Employment statistics and revenue data are not readily available for the personal care agency share of these major health care providers. The DQA has no data on personal care agencies, as these are not currently regulated by the agency. Based on the limited data available, it is estimated that 70 personal care agencies will initially seek certification from the department. The number of small business entities is unknown. Certification is required for these agencies to qualify for reimbursement from the Medicaid program. Currently, personal care agencies are reimbursed for services through counties or other third-party Medicaid providers.

This emergency order makes it possible for personal care agencies to bill the Wisconsin Medicaid program directly by complying with certification requirements in the Medicaid regulations. The overall outcome for the small businesses affected by the rules should be positive.

2009 Act 28, the 2009-11 biennial budget bill, expands the types of entities that can be certified by the department as Medicaid personal care providers. In particular, personal care agencies other than counties, Tribes, home health agencies, and Independent Living Centers can be certified directly as Medicaid providers. This emergency rule amends the existing Medicaid personal care certification rule, DHS 105, to implement the biennial budget provisions.

Counties, Tribes, home health agencies, and Independent Living Centers that are already Medicaid certified personal care providers under the prior statutory provisions, can remain personal care providers, without initiating or going through an application process.

In addition to specifying the certification procedures for independently certified personal care agencies, the emergency rule also updates requirements and includes new requirements for personal care providers to strengthen the protection of clients' health, safety, and rights. These changes apply both to existing certified personal care providers and to personal care agencies that seek certification under the Act 28 provisions. Based on consultations with personal care providers, these new requirements are best practices that have generally already been adopted by providers. For this reason they are not expected to impose new workload on providers.

The fiscal impact on small business as defined in s. 227.114(1), Stats., should be minimal. The items listed below have been identified as potentially increasing revenues or costs to personal care providers.

Independent personal care agency certification

The provisions of the emergency rule will allow personal care agencies that provide services under contract with a county, Tribe, home health agency, or independent living center to become independently certified and bill the Medicaid program directly for personal care services. In addition, other agencies that do not currently serve Medical Assistance recipients will be able to be certified as Medical Assistance providers, begin serving Medical Assistance recipients, and be reimbursed for their services. The rule provisions would increase revenues for agencies that seek to be certified.

Application and annual fee

Personal care agencies that seek Medicaid certification under the provisions of Act 28 will be required to pay an initial application fee and an annual fee. Fees will be established by the Department's Division of Quality Assurance and may be

periodically revised. The amount of the annual fee will be based on a number of factors including revenues from operations. The Division of Quality Assurance anticipates that initially the application fee will be \$300. It is anticipated the annual fee will range from a minimum of \$500, not to exceed \$2,500 and will be based on the annual revenue of the freestanding personal care agency.

#### Minimize Risk of Infection

The first substantive revision requires agencies to provide staff training and proper supplies to minimize the risk of infection and to monitor for compliance. This requirement is expected to result in minimal costs to providers because many personal care providers in Wisconsin already provide staff training and monitoring to meet current standards of practice and Centers for Disease Control (CDC) guidelines. Any provider that does not meet this standard is able to access information from CDC's web site to train their staff and start their monitoring program. Additional costs for sundry supplies (e.g., gloves, masks, etc.) are expected to be minimal.

#### Communicable disease screening

Personal care providers will be required to ensure that employees are screened for the presence of clinically apparent communicable diseases, including tuberculosis, within 90 days before the employee has direct client contact. This standard is similar to employee health screening requirements for nursing homes, home health agencies, hospices, hospitals, facilities for the developmentally disabled and restaurants. *The Journal of American Medical Association* (April 19, 2000) identifies health care workers as a group at risk for acquiring tuberculosis. Pulmonary tuberculosis is a contagious disease that is usually spread through the coughing and sneezing of an infected person. Transmission of the infection usually occurs only after prolonged exposure. It is important for persons in high risk groups to be tested to ensure they are free from infectious disease to prevent exposure and spread of the disease to clients and to identify the need for treatment.

The average time to complete the pre-employment screening is estimated to be 30 minutes, at an estimated cost of \$14 per employee. Although not required by rule, this may encourage providers to complete a tuberculosis skin test, at an average cost of \$50 each.

#### Training and Orientation

The rules will require an estimated additional 4 hours of training and orientation for personal care workers (PCWs) and registered nurses. It is estimated that the average hourly rate is \$28.00 salary and fringe. Estimated per staff costs are \$116 per affected employee.

#### Discharge summary

The proposed rules require the completion of a discharge summary for all clients. It is estimated that a registered nurse will need 10 minutes to complete this requirement. The per-client cost is estimated at \$7 (\$40 per hour salary and fringe x 10 minutes).

#### **Effect on small business:**

The proposed rule will affect at least 10% of the small businesses affected by the rule, but the rules will not have a significant negative economic impact on those businesses.

#### **Agency contact person:**

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

A public hearing will be held on February 3, 2010, 9:00 a.m. - 11:00 a.m., at the Wilson Street State Office Building, 1 West Wilson Street, Room 950A, Madison, WI. Comments may be submitted to the agency contact person listed above or to the Wisconsin Administrative Rules Website at [www.adminrules.wisconsin.gov](http://www.adminrules.wisconsin.gov) until February 4, 2009, 4:30 p.m.

TEXT OF EMERGENCY RULE

**SECTION 1.** DHS 105.01 (6) is amended to read:

DHS 105.01 (6) NOTIFICATION OF CERTIFICATION DECISION. ~~Within~~ Except as provided in s. DHS 105.17 (5), within 60 days after receipt by the department or its fiscal agent of a complete application for certification, including evidence of licensure or Medicare certification, or both, if required, the department shall either approve the application and issue the certification or deny the application. If the application for certification is denied, the department shall give the applicant reasons, in writing, for the denial.

**SECTION 2.** DHS 105.17 (1) (intro.) is renumbered DHS 105.17 (1c) (intro.) and amended to read:

DHS 105.17 (1c) REQUIREMENTS. For MA certification, a personal care provider shall be one of the following types of entities and shall meet applicable certification requirements:

(a) A home health agency licensed under s. 50.49, Stats., and ch. DHS 133, ~~a.~~

(b) A county department established under s. 46.215, 46.22 or 46.23, Stats., ~~a.~~

(c) A county department established under s. 51.42 or 51.437, Stats., which has the lead responsibility in the county for administering the community options program under s. 46.27, Stats., ~~an.~~

(d) An independent living center as defined in s. 46.96 (1) (ah), Stats., ~~or a.~~

(e) A federally recognized American Indian tribe or band in Wisconsin.

(f) ~~A certified provider shall be a freestanding personal care agency.~~

**SECTION 3.** DHS 105.17 (1) (a) and (b) are renumbered DHS 105.17 (1e) (a) and (b) and amended to read:

DHS 105.17 (1e) (a) Possess the capacity to enter into a legally binding contract~~;~~

(b) Present a proposal to the department to provide personal care services that does all of the following:

1. Documents cost-effective provision of services~~;~~

2. Documents a quality assurance mechanism and quality assurance activities~~;~~

3. Demonstrates that employees possess knowledge of and training and experience with special needs, including independent living needs, of the client group or groups receiving services~~;~~

**SECTION 4.** DHS 105.17 (1) (c), (d), and (e) are renumbered DHS 105.17 (1g) (a), (b), and (c) and amended to read:

DHS 105.17 (1g) (a) Cash flow. Document adequate resources to maintain a cash flow sufficient to cover operating expenses for 60 days~~;~~

(b) Accounting methods. Document a financial accounting system that complies with generally accepted accounting principles~~;~~

(c) Recordkeeping. Maintain all of the following records ~~identified in sub. (4);~~

**SECTION 5.** DHS 105.17 (1) (f) is renumbered DHS 105.17 (1n) (intro.) and amended to read:

DHS 105.17 (1n) PERSONNEL MANAGEMENT. ~~Document~~ The personal care provider shall document and implement a system of personnel management, if more than one personal care worker is employed or under contract, that includes all of the following:

**SECTION 6.** DHS 105.17 (1) (g) (intro.) and 1. to 3. are renumbered DHS 105.17 (1w) (d) (intro.) and 1. to 3. and amended to read:

DHS 105.17 (1w) (d) Client Records. Maintain all of the following records for each ~~recipient~~ client:

1. The nursing assessment, physician prescription, plan of care, personal care worker's assignment and record of all assignments, and record of registered nurse supervisory visits;

2. The record of all visits by the personal care worker, including observations and assigned activities completed and not completed; ~~and,~~

3. ~~A copy of written agreements between the personal care provider and RN supervisor, if applicable; Written acknowledgement of receipt by the client of the client's rights and responsibilities, provider rules and policies, and the department statement on how to register a complaint.~~

**SECTION 7.** DHS 105.17 (1) (i) (j), (k), and (h) are renumbered DHS 105.17 (1n) (b), (c), (d) and (e) and amended to read:

DHS 105.17 (1n) (b) Employ trained personal care workers as described under sub. (3), or train or arrange and pay for training of employed or subcontracted personal care workers as necessary; No employee or subcontractor may be assigned any duty for which he or she is not trained.

(c) Employ or contract with at least one registered nurse;

(d) Supervise the provision of personal care services;

(e) Employ or contract with personal care workers to provide personal care services;

**SECTION 8.** DHS 105.17 (1) (L) is repealed.

**SECTION 9.** DHS 105.17 (1) (m) is renumbered DHS 105.17 (1g) (d) and amended to read:

DHS 105.17 (1g) (d) Billing. Bill the medical assistance program for ~~personal care services, for registered nurse supervisory visits and for disposable medical supplies;~~ covered under s. DHS 107.112.

**SECTION 10.** 105.17 (1) (n) is renumbered DHS 105.17 (1w) (e) and amended to read:

DHS 105.17 (1w) (e) Client's preference for services. Give full consideration to a ~~recipient's~~ client's preferences for service arrangements and choice of personal care workers;

**SECTION 11.** 105.17 (1) (o) is renumbered DHS 105.17(1w) (h) and amended to read:

DHS 105.17 (1w) (h) Client grievances and complaints. ~~Document~~ Provide and document a grievance mechanism to resolve ~~recipient's~~ clients' complaints about personal care services, including a personal care provider's decision not to hire a ~~recipient's~~ client's choice of a personal care worker; The procedure shall set forth a procedure for clients to register complaints with the department.

**SECTION 12.** DHS 105.17 (1) (p) is renumbered DHS 105.17 (1n) (f) and (fm) and amended to read:

DHS 105.17 (1n) (f) ~~Perform all functions and provide all services specified~~ In the case of personal care workers who are not employees of the personal care provider, specify all required training, qualifications and services to be performed in a written personal care provider contract between the personal care provider and personal care workers ~~under contract~~, and maintain a copy of that contract on file.

(fm) Document performance of personal care services by personal care workers ~~under contract~~ by maintaining time sheets of personal care workers which ~~will~~ document the types and duration of services provided, by funding source;

**SECTION 13.** DHS 105.17 (1) (q) is renumbered 105.17 (1e) (c) and amended to read:

DHS 105.17 (1e) (c) Provide a written plan of operation describing the entire process from referral through delivery of services and follow-up;

**SECTION 14.** DHS 105.17 (1) (r) is renumbered DHS 105.17 (1r) (d) and amended to read:

DHS 105.17 (1r) (d) ~~Provide the~~The personal care worker with basic materials and provider shall provide equipment needed to deliver personal care services; and supplies necessary for all staff having direct care contact with the client to minimize the risk of infection.

**SECTION 15.** DHS 105.17 (1) (s) is renumbered DHS 105.17 (1e) (d) and amended to read:

DHS 105.17 (1e) (d) Cooperate with other health and social service agencies in the area and with interested community referral groups to avoid duplication of services and to provide coordination of personal care services to ~~recipients; and clients.~~

**SECTION 16.** DHS 105.17 (1) (t) is renumbered DHS 105.17 (1n) (a) 1.

DHS 105.17 (1n) (a) 1. Evaluate ~~each personal care worker's work~~every personal care worker and RN supervisor employed by or under contract with the provider periodically according to the provider's policy for quality of performance on a periodic basis and adherence to the provider's policies and this chapter and s. DHS 107.112. Evaluations shall be followed up with appropriate action.

**SECTION 17.** DHS 105.17 (1) is created to read:

**DHS 105.17 Personal care providers.** (1) DEFINITIONS. In this section:

(a) "Freestanding personal care agency" means an entity described in s. 49.45 (42) (d) 3.e., Stats.

(b) "Legal representative" means a person who is any of the following:

1. A guardian as defined under s. 54.01 (10), Stats.

2. A person appointed as a health care agent under an activated power of attorney for health care under ch. 155, Stats.

3. A person appointed as an agent under a durable power of attorney under ch. 243.07, Stats, executed on or before April 28, 1990.

4. A parent of a minor child.

(c) "Principal" means an administrator, a person with management responsibility for the applicant, an officer or person owning directly or indirectly 5% or more of the shares or other evidences of ownership of a corporate applicant, a partner in a partnership which is an applicant, or the owner of a sole proprietorship which is an applicant.

**SECTION 18.** DHS 105.17 (1e) (title), (intro.) and (e) are created to read:

DHS 105.17 (1e) (title) CONTRACTING, PLANNING AND COORDINATION; FIT AND QUALIFIED. A personal care provider shall do all of the following:

(e) Be fit and qualified. All of the following factors are relevant to a determination by the department whether the applicant is fit and qualified for purposes of this paragraph:

1. Any adverse action against the applicant or any principal by a licensing agency of any state that resulted in denial, suspension, injunction, or revocation of a license to operate a human services or health care agency or facility.

2. Any adverse action against the applicant or any principal initiated by a state or federal agency based on non-compliance that resulted in civil money penalties, termination of a provider agreement, suspension of payments, or the appointment of temporary management of a facility or agency.

3. Any conviction of the applicant or any principal for a crime involving neglect or abuse of patients or of the elderly or involving assaultive behavior or wanton disregard for the health or safety of others, or any act of abuse under ss. 940.285 or 940.295, Stats., or similar law in another jurisdiction.

4. Any conviction of the applicant or any principal for a crime related to the delivery of personal care or other health care-related services or items, or for providing personal care or other health care-related services without a license or other form of permission required by law.

5. Any conviction of the applicant or any principal for a crime involving a controlled substance under ch. 961, Stats., or similar law in another jurisdiction.

6. Any conviction of the applicant or any principal for a crime involving a sexual offense.

7. Any prior financial failure of the applicant or any principal that resulted in bankruptcy or in the closing of a human services or health care agency or facility or the relocation or discharge of such an agency's or facility's patients.

8. Any unsatisfied judgment against the applicant or any principal or any debts that are at least 90 days past due.

**SECTION 19.** DHS 105.17 (1g) (title) and (intro.) are created to read:

DHS 105.17 (1g) (title) FINANCES; ACCOUNTING; RECORDKEEPING; BILLING. A personal care provider shall do all of the following:

**SECTION 20.** DHS 105.17 (1n) (a) 2. and 3. are created to read:

DHS 105.17 (1n) (a) 2. Provide orientation and on-going instruction for RN supervisors and personal care workers. Personal care workers shall receive orientation before providing services to a client. The titles of the persons responsible for conducting orientation and training shall be specified in the plan. The plan shall include a system for providing instruction when an evaluation of the RN's or personal care worker's performance or competency indicates additional instruction may be needed. Orientation shall include training on all of the following:

a. Policies and objectives of the provider.

b. Information concerning specific job duties. Training shall be provided for each skill the personal care worker is assigned and shall include a successful demonstration of each skill by the personal care worker to the qualified trainer, under the supervision of the RN supervisor, prior to providing the service to a client independently.

c. The functions of personnel employed by the provider and how they interrelate and communicate with each other in providing services.

d. Health and safety procedures for working in a home environment.

e. Epidemiology, modes of transmission and prevention of infections and the need for routine use of current infection control measures as recommended by the U. S. centers for disease control and prevention.

f. Responding to medical and non-medical emergencies.

g. Ethics, confidentiality of client information, and client rights.

3. Comply with the caregiver background check requirements under s. 50.065, Stats., and ch. DHS 12, including the disclosure requirements under s. 50.065 (2m) Stats., and s. DHS 12.115. The provider shall also comply with the caregiver misconduct reporting and investigation requirements under ch. DHS 13.

**SECTION 21.** DHS 105.17 (1r) (a) to (c) are created to read:

DHS 105.17 (1r) INFECTION CONTROL AND PREVENTION. (a) The personal care provider shall develop and implement written policies for control of communicable diseases that take into consideration control procedures incorporated by reference in ch. DHS 145 and that ensure that employees with symptoms or signs of communicable disease or infected skin lesions are not permitted to work unless authorized to do so by a physician or physician assistant or advanced practice nurse.



(b) 1. The personal care provider shall ensure that each new employee, before having direct contact with clients, is certified in writing by a physician, physician assistant or registered nurse as having been screened for tuberculosis, and clinically apparent communicable disease that may be transmitted to a client during the normal performance of the employee's duties. The screening shall occur within 90 days before the employee has direct client contact.

2. The personal care provider shall ensure that each continuing employee having direct contact with clients is periodically screened for clinically apparent communicable disease by a physician, physician assistant, or registered nurse based on the likelihood of their exposure to a communicable disease, including tuberculosis. The exposure to a communicable disease may have occurred in the community or in another location.

(c) The personal care provider shall monitor employees' adherence to evidence-based standards of practice as recommended by the U.S. centers for disease control and prevention, or other evidenced-base standards of practice, related to protective measures. When monitoring reveals a failure to follow evidence-based standards of practice, the provider shall provide counseling, education, or retraining to ensure staff is adequately trained to complete their job responsibilities.

**SECTION 22.** DHS 105.17 (1w) (title), (intro.), (a), (b), (c), (d) 4. (f), (g), and (h) Note are created to read:

DHS 105.17 (1w) CLIENT SERVICES. The personal care provider shall do all of the following:

(a) *Acceptance.* Assess a prospective client's appropriateness to be served by the provider without delay, unless the reason for the delay is justifiable and documented, and accept a client only if there is reasonable expectation that the client's needs can be met by the provider. If the provider accepts the applicant as a client, the provider shall promptly provide services to the individual. If the provider does not accept an applicant as a client, the provider shall inform the applicant of other personal care providers in the area or how to obtain a list of those providers.

(b) *Information to provide to the client.* The provider shall provide, in writing, prior to or at the time of accepting an applicant as a client, each client or the client's legal representative all of the following:

1. The provider's rules and the client's responsibilities under the provider's rules.

2. The procedures indicating the complaint or grievance process which shall include a statement on how the client can make a complaint to the department.

3. A statement of client's rights which shall include all of the following:

a. To be fully informed of these rights and of all of the provider's rules governing client responsibilities.

b. To be fully informed of services available from the provider.

c. To be informed of all changes in services and charges as they occur.

Note: For clients who are Medicaid recipients, personal care services are not subject to recipient cost sharing, per Wis.Stat. s. 49.45(18)(b)11., and the provider is prohibited from charging the recipient for services in addition to or in lieu of obtaining Medicaid payment, per Wis.Stat. s. 49.49 (3m).

d. To participate in the planning of services, including referral to a health care institution or other provider and to refuse to participate in experimental research.

dm. To have access to information about the client's health condition to the extent required by law.

Note: Wis.Stat. s. 146.83 and federal HIPAA regulations [45 CFR s. 164.524] generally require health care providers to make health care records available for inspection by the patient.

e. To refuse service and to be informed of the consequences of that refusal.

f. To confidential treatment of personal and medical records and to approve or refuse their release to any individual outside the provider, except in the case of transfer to another provider or to a health facility, or as otherwise permitted by law.

g. To be treated with consideration, respect and full recognition of dignity and individuality, including privacy in treatment and in care for personal needs.

h. To be taught the service required so that the client can, to the extent possible, help himself or herself.

i. To have a person designated by the client taught the service required, so that, to the extent possible, the person designated can understand and help the client.

j. To have one's property treated with respect.

k. To complain about the care that was provided or not provided, and to seek resolution of the complaint without fear of recrimination.

l. To have the client's legal representative exercise the client's rights when the legal representative is legally authorized to do so.

(c) *Service agreement.* Before services are provided, the personal care provider shall inform the client, orally and in writing, of the extent to which payment may be expected from other sources, the charges for services that will not be covered by other sources and charges that the individual may have to pay.

Note: For clients who are Medicaid recipients, personal care services are not subject to recipient cost sharing, per Wis.Stat. s. 49.45(18)(b)11., and the provider is prohibited from charging the recipient for services in addition to or in lieu of obtaining Medicaid payment, per Wis.Stat. s. 49.49(3m).

(d) 4. A copy of the discharge summary.

(f) *Discharge of a client.* 1. A personal care provider may discharge a client only for one or more of the reasons listed in subds. 2., 3., or 6. and only after discussing the reasons for the discharge with the client or the client's legal representative and the client's attending physician, and providing written notice to the client or client's legal representative within the timelines specified in this paragraph.

2. The personal care provider shall provide written notice to the client or the client's legal representative at least 14 calendar days in advance of the discharge if the reason for the discharge is either of the following:

a. The provider is unable to provide the personal care services required by the client due to either a change in the client's conditions that is not an emergency, or the provider's documented inability to staff the case.

b. Non-payment for services.

3. The personal care provider shall provide written notice to the client or the client's legal representative at the time of the discharge if the reason for the discharge is the result of any of the following:

a. The safety of the personal care worker or nurse supervisor is compromised, as documented by provider staff.

b. The attending physician orders the discharge of the client for emergency medical reasons.

c. The client no longer needs personal care service as determined by the attending physician.

d. The client is abusing or misusing the personal care benefit as determined by the department or county agency under s. DHS 104.02 (5).

4. A copy of the written notice of discharge shall be placed in the client's medical record.

5. The personal care provider shall include all of the following in the written notice of discharge required under this paragraph:

a. The reason the provider is discharging the client.

b. The assistance the personal care provider is able to provide in arranging for continuity of all necessary personal care services.

c. A notice of the client's right to file a complaint with the department if the client believes the discharge does not comply with any of the provisions of this section and the department's toll-free complaint telephone number and the address and telephone number of the department's division of quality assurance.

Note: A complaint may be filed by writing the Bureau of Health Services, Division of Quality Assurance, P.O. Box 2969, Madison, Wisconsin 53701-2969 or by calling the department's toll-free complaint line at 1-800-642-6552 or by filing a complaint at <http://dhfs.wisconsin.gov/bqaconsumer/HealthCareComplaints.htm>.

6. No written notification is necessary for discharge for any of the following reasons:

- a. The client dies.
- b. The client changes place of residence to a location in an area not served by the provider.
- c. The client or the client's legal representative notifies the provider in writing to terminate services.

7. The personal care provider shall complete a written discharge summary within 30 calendar days following discharge of a client or voluntary termination of services by the client or the client's representative. The discharge summary shall include a description of the care provided and the reason for discharge. The personal care provider shall place a copy of the discharge summary in the former client's medical record. Upon request, the personal care provider shall provide a copy of the discharge summary to the former client, the client's legal representative, the attending physician, or advanced practice nurse prescriber.

Note: A complaint may be filed by writing the Bureau of Health Services, Division of Quality Assurance, P.O. Box 2969, Madison, Wisconsin 53701-2969 or by calling the department's toll-free complaint line at 1-800-642-6552 or by filing a complaint at <http://dhfs.wisconsin.gov/bqaconsumer/HealthCareComplaints.htm>

**SECTION 23.** DHS 105.17 (2) (a) (intro.), 1. and 2. are amended to read:

DHS 105.17 (2) (a) *Qualifications.* ~~An RN supervisor under~~ A personal care provider shall employ or contract with or employed by a personal care provider an RN supervisor who shall have all of the following qualifications:

1. ~~Be licensed in Wisconsin pursuant to~~ Current licensure as a registered nurse under s. 441.06, Stats; .
2. ~~Be a public health nurse or be currently or previously employed by a home health agency, an independent living center or a hospital rehabilitation unit; and~~ Training and experience in the provision of personal care services or in a related program.

**SECTION 24.** DHS 105.17 (2) (a) 3. is repealed and recreated to read:

DHS 105.17 (2) (a) 3. At least one year of supervisory or administrative experience in personal care services or in a related program.

**SECTION 25.** DHS 105.17 (2) (b) (intro.), 2., and 3. are amended to read:

DHS 105.17 (2) (b) *Duties.* The RN supervisor shall perform all of the following duties:

1. Evaluate the need for services and make referrals to other services as appropriate; .
2. Secure written orders from the ~~recipient's~~ client's physician. These orders are to be renewed once every 3 months unless the physician specifies that orders covering a period of time up to one year are appropriate, or when the ~~recipient's~~ client's needs change, whichever occurs first; .
3. Develop a plan of care for the ~~recipient~~ client, giving full consideration to the ~~recipient's~~ client's preferences for service arrangements and choice of personal care workers, interpret the plan to the personal care worker, include a copy of the plan in the ~~recipient's~~ client's health record, and review the plan at least every 60 days and update it as necessary; .

**SECTION 26.** DHS 105.17 (2) (b) 3m. is created to read:

DHS 105.17 (2) (b) 3m. Promptly notify a client’s physician or other appropriate medical personnel and legal representative, if any, of any significant changes observed or reported in the client’s condition.

**SECTION 27.** DHS 105.17 (2) (b) 4., 5., and 6. are amended to read:

DHS 105.17 (2) (b) 4. Develop appropriate time and service reporting mechanisms for personal care workers and instruct the workers on their use;

5. Give the personal care worker written instructions about the services to be performed and demonstrate to the personal care worker how to perform the services; ~~and.~~

6. Evaluate the competency of the personal care worker to perform the services.

**SECTION 28.** DHS 105.17 (3) (a) 1. and 3. are amended to read:

DHS 105.17 (3) (a) 1. Be trained under s. DHS 105.17 (1p) (a) 2. and (b) in the provision of personal care services, and in each skill that the personal care worker is assigned. ~~Training shall consist of a minimum of 40 classroom hours, at least 25 of which shall be devoted to personal and restorative care, or 6 months of equivalent experience. Training shall emphasize techniques for and aspects of caring for the population served by the provider;~~

3. Be a person who is not a legally responsible relative of the recipient/client under s. 49.90 (1), Stats.; ~~and.~~

**SECTION 29.** DHS 105.17 (3) (a) 4. is repealed.

**SECTION 30.** DHS 105.17 (3) (b) 1. to 4. are amended to read:

DHS 105.17 (3) (b) *Duties.* Personal care workers shall ~~perform~~ do all of the following duties:

1. Perform tasks assigned by the RN supervisor;

2. Report in writing to the RN supervisor on each assignment;

3. ~~Report~~ Promptly report any significant changes observed or reported in the recipient’s/client’s condition to the RN supervisor; ~~and.~~

4. Confer as required with the RN supervisor regarding the recipient’s/client’s progress.

**SECTION 31.** DHS 105.17 (3) (b) 5. is created to read:

DHS 105.17 (3) (b) 5. Upon coming in contact with blood or other potentially infectious materials including those that are air-borne, non-intact skin, or mucus membranes in caring for clients, practice infection control measures as recommended by the U.S. centers for disease control and prevention.

**SECTION 32.** DHS 105.17 (4) (title) is amended to read:

DHS 105.17 (4) (title) ~~ANNUAL REVIEW OF PERSONAL CARE PROVIDERS~~ INSPECTIONS AND INVESTIGATIONS.

**SECTION 33.** DHS 105.17 (4) (intro.) is renumbered DHS 105.17 (4) (a) 1. and amended to read:

DHS 105.17 (4) (a) 1. The department’s ~~bureau~~ division of quality ~~compliance shall conduct an annual on-site review of each personal care provider. Records to be reviewed include:~~ assurance may make any inspections and investigations, including complaint investigations, it considers necessary and may review clinical and administrative records, policies and other documents required under this section.

**SECTION 34.** DHS 105.17 (4) (g) is repealed.

**SECTION 35.** DHS 105.17 (4) (a) to (f), (h), and (i) are renumbered DHS 105.17 (1g) (c) 1. to 8. and amended to read:

- DHS 105.17 (1g) (c) 1. Written personnel policies;
2. Written job descriptions;
3. A written plan of operations indicating the entire process from making referrals through delivery of services and follow-up;
4. A written statement defining the scope of personal care services provided, including the population being served, service needs and service priorities;
5. A written record of personal care workers' ~~40 hours of training~~;
6. Workers' time sheets;
7. Contracts with workers and other agencies; ~~and~~
8. Records of supervisory visits.

**SECTION 36.** DHS 105.17 (4) (a) 2., (b), and (c) are created to read:

DHS 105.17 (4) (a) 2. Any interference with or refusal to allow or cooperate with any inspection or investigation under this subsection may be grounds for termination of MA certification.

(b) The department may contact clients of personal care providers as part of an inspection or investigation. The provider shall provide the department a list of names, addresses and other identifying information of current and past clients as may be requested. The department may select the names of the clients to be contacted and may contact these clients upon the client's approval.

(c) Upon determining that a personal care provider is not compliant with one or more certification requirements under this section or s. DHS 107.112, the department shall promptly notify the provider of the specific rule violated, state the facts that constitute the deficiency and specify the date by which the provider is required to correct the deficiency.

**SECTION 37.** DHS 105.17 (5) is created to read:

DHS 105.17 (5) MA APPLICATION REQUIREMENTS; FREESTANDING PERSONAL CARE AGENCIES.  
(a) *Application for MA certification.* For MA certification, a freestanding personal care agency shall submit an application on forms provided by the department, and provide all information requested on the forms. The application shall be fully completed and submitted with the applicable nonrefundable fee in an amount established by the department.

Note: To obtain a copy of the application forms, send your request to the Division of Quality Assurance, P.O. Box 2969, Madison, Wisconsin 53701-2969. The street address is 1 W. Wilson Street in Madison. The e-mail address is: Plicnshomesfdds@dhs.wisconsin.gov. The completed application forms should be sent to the same office.

Note: Fees are permitted under s. 49.45 (42) (c), Stats., and set and periodically revised by the Department's Division of Quality Assurance. Fees may vary based on a number of factors including revenues from operations.

(b) *Issuance of certification.* Following receipt of a complete application for MA certification or for a change in certification when there has been a change in the ownership of a freestanding personal care agency, the department shall review the application and investigate the applicant and principals to determine the applicant's ability to comply with this section. Except as provided in par. (c), within 90 days after receiving a complete application, the department shall either approve the application and issue the certification or deny the application. Except as provided in par. (c), a certification issued under this section is valid indefinitely unless sooner terminated or suspended under ss. DHS 106.05, DHS 106.06 or DHS 106.065.

(c) *Provisional Certification*. 1. The department may, within the 90-day period in par. (b), issue a provisional certification for a term of up to one year under any of the following circumstances:

a. The department has not completed its investigation of the applicant within 90 days after receiving a completed application.

b. The applicant attests that at the time of the application, the applicant is providing Medicaid personal care under contract with a Medicaid certified personal care provider that is a county agency, independent living center, federally-recognized American Indian tribe or band in Wisconsin or home health agency, and that the applicant is in compliance with this section and s. DHS 107.112.

2. Within 90 days before its provisional certification expires, a provisionally certified personal care provider shall submit a written request to the department for an on-site survey. The provider shall show that the provider has served at least 5 clients requiring personal care services during the period of provisional certification. At the time of the on-site survey the provider shall be providing personal care services to at least 2 clients.

(d) *Annual reporting and fee*. 1. Every 12 months, on a schedule determined by the department, a certified freestanding personal care agency shall submit an annual report to the department in the form and containing the information that the department requires. The freestanding personal care agency shall submit with the report a fee in an amount determined by the department. If a complete annual report and fee are not timely submitted to the department, the department shall issue a warning to the freestanding personal care agency.

2. The department may terminate certification of a freestanding personal care agency that does not submit a completed report and fee to the department within 60 days after the date established by the department in subd. 1.

Note: Fees are permitted under s. 49.45 (42) (c), Stats., and set and periodically revised by the Department's Division of Quality Assurance. Fees may vary based on a number of factors including revenues from operations.

**SECTION 38.** DHS 106.06 (4m) is created to read:

DHS 106.06 (4m) In the case of a freestanding personal care agency as defined in s. DHS 105.17 (1) (a), the freestanding personal care agency has violated one or more of the applicable requirements of ch. DHS 105 in a manner or to a degree that may endanger or threaten the health or safety of clients, has not paid the fee, or has failed to provide information requested by the department in connection with certification;

**SECTION 39.** DHS 133.02 (5m) (c) is amended to read:

DHS 133.02 (5m) (c) A person appointed as an agent to make health care decisions under a durable power of attorney under s. 243.07, Stats., executed on or before April 28, 1990.

**SECTION 40.** DHS 133.02 (5m) (d) is created to read:

DHS 133.02 (5m) (d). A parent of a minor.

**SECTION 41.** EFFECTIVE DATE: The rules contained in this order shall take effect as emergency rules upon publication in the official state newspaper, as provided in s. 227.24 (1) (c), Stats.

ADMINISTRATIVE RULES – FISCAL ESTIMATE

1. Fiscal Estimate Version

Original  Updated  Corrected

2. Administrative Rule Chapter Title and Number

Provider Certification, Chapter DHS 105

3. Subject

Medicaid certification for personal care providers.

4. State Fiscal Effect:

No Fiscal Effect

Indeterminate

Increase Existing Revenues

Decrease Existing Revenues

Increase Costs

Yes  No May be possible to absorb within agency's budget.

Decrease Costs

5. Fund Sources Affected:

GPR  FED  PRO  PRS  SEG  SEG-S

6. Affected Ch. 20, Stats. Appropriations:

7. Local Government Fiscal Effect:

No Fiscal Effect

Indeterminate

Increase Revenues

Decrease Revenues

Increase Costs

Decrease Costs

8. Local Government Units Affected:

Towns  Villages  Cities  Counties  School Districts  WTCS Districts  Others:

9. Private Sector Fiscal Effect (small businesses only):

No Fiscal Effect

Indeterminate

Increase Revenues

Decrease Revenues

Yes  No May have significant economic impact on a substantial number of small businesses

Increase Costs

Yes  No May have significant economic impact on a substantial number

of small businesses

Decrease Costs

10. Types of Small Businesses Affected:

Personal care agencies.

11. Fiscal Analysis Summary

A proposal included by the Wisconsin Legislature in the biennial budget act, 2009 Wisconsin Act 28, expands the types of entities whose personal care services may be reimbursable by Medical Assistance. To implement the legislation, the department has developed rules by which to certify personal care providers other than county agencies, home health agencies, tribes and Independent Living Centers that want to directly bill and be reimbursed by the Medical Assistance program for personal care services provided to recipients of Medical Assistance. This will allow existing personal care

providers that currently bill the Medical Assistance program through one of the types of agency listed above to directly bill the Medical Assistance program, in the event their billing agency discontinues Medical Assistance certification as a personal care agency. In addition, some additional personal care agencies that do not serve Medical Assistance recipients will be able to be certified as Medical Assistance providers, begin serving Medical Assistance recipients, and be reimbursed for their services.

The rule allows small businesses to bill the Wisconsin Medicaid program for reimbursement for services they provide where they cannot do so now. As a result, rule will be beneficial to them, as it will allow them to bill the Medicaid program for reimbursement.

Act 28 included these provisions because it was anticipated that some counties may choose to discontinue their Medicaid personal care certification when they implement Family Care. The provisions would allow independently certified personal care agencies to serve Medicaid recipients who were previously served by the county. The rule provisions will not have any fiscal effect on state agencies other than those already reflected in Act 28.

In addition, the rule includes new provisions applying to all personal care providers regarding infection control, communicable disease screening, training and orientation, and discharge summaries. These provisions will not increase state agency costs. The provisions may result in a minimal cost increase for county agencies certified as personal care providers.

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**12. Long-Range Fiscal Implications**

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None known.

13. Name - Prepared by Larry Schneider	Telephone Number 267-2874	Date 10/30/2009
14. Name – OSF Analyst Reviewer Andy Forsaith	Telephone Number 266-7684	Date
Signature – DHS Secretary or Designee	Telephone Number	Date