

**Publication Date:** January 19, 2010  
**Effective Dates:** January 19, 2010 through October 15, 2010

### **ORDER OF THE DEPARTMENT OF REVENUE ADOPTING AN EMERGENCY RULE**

The Wisconsin Department of Revenue hereby adopts an emergency rule interpreting s. 146.98, Stats., relating to the ambulatory surgical center assessment.

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#### *Analysis by the Department of Revenue*

**Statutes interpreted:** ss. 146.98 and 20.566 (1) (gn), Stats.

**Statutory authority:** ss. 146.98 (3), (4), and (5) and 227.24 Stats.

**Related statute or rule:** section 50.38, Stats., imposes a hospital assessment, and s. 50.14, Stats., imposes an assessment on licensed nursing home beds and intermediate care facilities for the mentally retarded (ICF-MR).

**Plain language analysis:** This emergency rule does the following:

- Establishes the requirements for administration of the ambulatory surgical center assessment.
- Describes how the amount of the assessment for each ambulatory surgical center is determined.
- Details how the department will collect assessments.
- Provides guidance regarding data required to be submitted to the department to determine assessment amounts.
- Specifies the filing, reporting, and payment deadlines for the assessment, and penalties imposed for failure to meet the requirements.

**Summary of, and comparison with, existing or proposed federal regulation:** Federal law 42 CFR §433.68 describes permissible health care-related taxes that states may impose without a reduction in Medicaid Federal Financial Participation (FFP) in the medical assistance program jointly funded by the federal government and the state. The taxes must be broad based, uniformly imposed throughout a jurisdiction, and cannot exceed 5.5% of revenues. Ambulatory surgical center or ASC is defined in 42 CFR §416.2 as “any distinct entity that operates for the purposes of providing surgical services to patients not requiring hospitalization, has an agreement with the Center for Medicare and Medicaid Services (CMS) to participate in Medicare as an ASC, and meets the conditions set forth in subparts B and C of this part.”

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

Illinois imposes health care provider taxes on hospitals, intermediate care facilities for the mentally retarded or developmentally disabled, and nursing homes. There is no assessment of ambulatory surgical centers.

Iowa imposes a health care provider tax on intermediate care facilities for the mentally retarded or developmentally disabled. There is no assessment on ambulatory surgical centers.

Michigan imposes a health care provider tax on hospitals, managed care organizations, nursing homes and community mental health programs. There is no assessment on ambulatory surgical centers.

Minnesota imposes a health care provider tax on hospitals, intermediate care facilities for the mentally retarded or developmentally disabled, managed care organizations, and nursing homes. In addition, a tax of 2% of total gross receipts is imposed on surgical centers.

**Summary of factual data and analytical methodologies:** 2009 Wisconsin Act 28 created s. 146.98 Stats., imposing an assessment on Medicare-certified ambulatory surgical centers in Wisconsin. The statute directs the department of revenue to allocate any assessment imposed among ambulatory surgical centers in proportion to their gross patient revenue. The department may determine the amount of the assessment, collect the assessment, require ambulatory surgical centers to provide any data that is required to determine assessment amounts, establish deadlines by which assessments shall be paid, and impose penalties for failure to comply with the requirements of the statute or any rules promulgated. The department is directed to transfer 99.5 percent of the assessments collected to the medical assistance trust fund and retain 0.5% of the assessment revenues collected to support the administrative costs related to the assessment.

Within the provisions of s. 146.98 (5), Stats., is a requirement that the department promulgate rules for the administration of the assessment. The department is authorized to promulgate the rule as an emergency rule for the period before the effective date of a permanent rule.

In consultation with ambulatory surgical centers, the departments of administration and health services, the department has created this emergency rule order to satisfy the above requirements.

**Analysis and supporting documents used to determine effect on small business:** This emergency rule is created in accordance with SECTIONS 2433x., 601s., 681g., and 9143.(4u) of 2009 Wisconsin Act 28 to administer and enforce statutory requirements relating to the assessment of ambulatory surgical centers. As the rule does not impose any significant financial or other compliance burden, the department has determined that it does not have a significant effect on small business.

**Anticipated costs incurred by private sector:** This emergency rule does not have a significant fiscal effect on the private sector.

**Effect on small business:** This emergency rule does not have a significant effect on small business.

**Agency contact person:** Please contact Dale Kleven at (608) 266-8253 or [dale.kleven@revenue.wi.gov](mailto:dale.kleven@revenue.wi.gov), if you have any questions regarding this emergency rule.

**Place where comments are to be submitted and deadline for submission:** Comments may be submitted to the contact person shown below no later than one week after the public hearing on this emergency rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

Dale Kleven  
Department of Revenue  
Mail Stop 6-40  
2135 Rimrock Road  
P.O. Box 8933  
Madison, WI 53708-8933

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## EXEMPTION FROM FINDING OF EMERGENCY

The legislature by SECTION 9143. (4u) of 2009 Wisconsin Act 28 provides an exemption from a finding of emergency for the adoption of the rule.

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**SECTION 1.** Tax 1.17 is created to read:

**Tax 1.17 Ambulatory surgical center assessment. (1) PURPOSE.** The purpose of this section is to establish procedures and other requirements necessary for levying and collecting the ambulatory surgical center assessment imposed under s. 146.98, Stats.

**(2) DEFINITIONS.** In this section:

(a) “Ambulatory surgical center” or “ASC” has the meaning given in s. 146.98 (1), Stats.

(b) “Cash basis” is the method of accounting where income is reported in the year that it is actually or constructively received in the form of cash or its equivalent or other property.

(c) “Department” means the department of revenue.

(d) “Gross patient revenue” means the gross amount received on a cash basis by the ambulatory surgical center from all patient services.

(e) “Patient services” include any of the following goods and services provided to a patient or consumer:

1. Bed and board.
2. Nursing services and other related services.
3. Use of the ambulatory surgical center.
4. Medical social services.
5. Drugs, biologicals, supplies, appliances and equipment.
6. Other diagnostic or therapeutic items or services.
7. Medical or surgical services.
8. Laboratory services.
9. Items and services furnished to ambulatory patients not requiring emergency care.
10. Emergency services including ambulance services.

**(3) REGISTRATION.** (a) Ambulatory surgical centers in this state are required to be registered with the department, in the manner prescribed by the department.

(b) On or before January 1, ambulatory surgical centers in this state shall notify the department of a change in ownership, address change, and any other information pertinent to the ambulatory surgical center’s assessment under s. 146.98, Stats., occurring in the previous calendar year.

(c) The department shall update ambulatory surgical center registration using information provided by the department of health services, division of quality assurance.

**(4) ANNUAL GROSS PATIENT REVENUE SURVEY.** (a) The department shall annually survey ambulatory surgical centers required to be registered under sub. (3) (a) to obtain any data required by the department needed to determine the amount of the assessment imposed in s. 146.98, Stats. Survey data filed shall be subject to the confidentiality provisions under s. 71.78, Stats.

(b) Ambulatory surgical centers required to be registered shall electronically file the survey annually on or before March 15.

(c) Ambulatory surgical centers may apply for a 5 day extension of the survey due date. An extension will be granted for good cause only. The application for an extension shall be filed electronically with the department on or before March 15 at <https://tap.revenue.wi.gov>.

(d) Failure to electronically file the survey with the department by the due date, including any extension, shall result in a late filing penalty of \$500 per day calculated from the day after the unextended due date up to the date the completed survey is received by the department, or April 1, whichever is earlier. Failure to file the survey during the period for the extension shall make the extension null and void.

**Examples: 1)** An ambulatory surgical center does not request an extension to file the annual survey and fails to file the survey by April 1, 2010. A daily \$500 late filing penalty is assessed for the period of March 16, 2010 through April 1, 2010, for a total late filing penalty of \$8,500.

**2)** An ambulatory surgical center is granted an extension, and files the annual survey on March 19, 2010. No late filing penalty is assessed.

**3)** An ambulatory surgical center is granted an extension to file the annual survey, but files the survey on March 24, 2010, after the expiration of the 5 day extension. A \$4,000 late filing penalty is assessed for the period of March 16, 2010 through March 23, 2010.

(e) The deadline for filing an amended survey is April 1. Information received after April 1 shall not be considered in the determination of the assessment. If any ambulatory surgical center fails, within the time required by this chapter, to file the survey, or files an incomplete or incorrect survey, the department shall make an assessment based upon any other information in the department’s possession and according to its best judgment.

(f) The department may impose a penalty of 25% of the amount of the assessment if the ambulatory surgical center fails to file the survey by April 1, pursuant to s. 146.98 (3) (e), Stats.

**(5) ASSESSMENT.** (a) The assessment shall be calculated using a uniform percentage that satisfies the requirements under 42 CFR 433.68 for collecting an assessment without incurring a reduction in federal financial participation under the federal Medicaid program.

(b) The department shall electronically notify an ambulatory surgical center of the amount of the assessment on April 15.

(c) The assessment shall be paid electronically on or before June 1 in a manner prescribed by the department. Failure to pay the assessment by June 1 shall result in a penalty of \$500 per day calculated from the day after the due date up to the date the assessment is received by the department, subject to a maximum penalty equal to the amount of the assessment. Payment of the penalty under this subdivision does not relieve the ambulatory surgical center from the responsibility of paying the assessment.

(d) The department may require estimated pre-payment of the assessment, in a manner prescribed by the department. The department shall notify ambulatory surgical centers at least 90 days before the first estimated payment is due.

**(6) AUDIT.** (a) The department may conduct an office or field audit to determine the assessment under s. 146.98, Stats., or to ascertain the correctness of the information reported on the annual survey required to be filed under sub. (4) (b).

(b) Ambulatory surgical centers shall retain financial books and records that support the information reported on the annual survey, and provide it to the department pursuant to s. 146.98 (3) (c), Stats.

(c) The department may impose a penalty equal to the amount of any unreported gross patient revenue multiplied by the percentage established for that period in sub. (5) (a).

**(7) APPEALS.** Ambulatory surgical centers claiming to be adversely affected by the department's action or inaction, other than a rulemaking action or proposal for legislation, may petition the department for a contested case hearing under s. 227.42, Stats. The request for hearing shall be in writing and served upon the Secretary of Revenue within 30 days after the department's action or inaction complained of.

**Note:** Written requests for hearing should be addressed to: Wisconsin Department of Revenue, Office of the Secretary, P.O. Box 8933, Madison, WI 53708.

**(8) COLLECTIONS.** (a) Assessments under sub. (5) (c) shall become delinquent if not paid when due, unless the department receives a request for hearing under sub. (7).

(b) The department may immediately proceed to collect delinquent assessments, including any penalties, in a manner comparable to that described in s. 77.62, Stats.

(c) Assessments unpaid for more than 90 days after appeal rights have expired shall be posted on the list on the Internet site maintained by the department under s. 73.03 (62), Stats.

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The rules contained in this order shall take effect upon publication in the official state newspaper as provided in s. 227.22 (2) (c), Stats.

DEPARTMENT OF REVENUE

Dated: \_\_\_\_\_

By: \_\_\_\_\_

Roger M. Ervin  
Secretary of Revenue

**FISCAL ESTIMATE FORM**

**2009 Session**

ORIGINAL     UPDATED  
 CORRECTED     SUPPLEMENTAL

LRB # 09-

INTRODUCTION #

Admin. Rule # Tax 1.17

**Subject**

**Fiscal Effect**

**State:**  No State Fiscal Effect  
Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

- |  |   |
|--|---|
| <input type="checkbox"/> Increase Existing Appropriation | <input type="checkbox"/> Increase Existing Revenues |
| <input type="checkbox"/> Decrease Existing Appropriation | <input type="checkbox"/> Decrease Existing Revenues |
| <input type="checkbox"/> Create New Appropriation        |   |

Increase Costs - May be Possible to Absorb  
Within Agency's Budget  Yes  No

Decrease Costs

**Local:**  No Local Government Costs

- |  |   |
|--|---|
| 1. <input type="checkbox"/> Increase Costs<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 3. <input type="checkbox"/> Increase Revenues<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |
| 2. <input type="checkbox"/> Decrease Costs<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 4. <input type="checkbox"/> Decrease Revenues<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |

5. Types of Local Governmental Units Affected:

- Towns  Villages  Cities  
 Counties  Others \_\_\_\_\_  
 School Districts  WTCS Districts

**Fund Sources Affected**

GPR  FED  PRO  PRS  SEG  SEG-S

**Affected Ch. 20 Appropriations**

**Assumptions Used in Arriving at Fiscal Estimate**

2009 Act 28 created s. 146.98, which directs the Department of Revenue to collect an annual assessment on ambulatory surgical centers in this state in proportion to their gross patient revenue, and to promulgate rules to implement the assessment.

This rule does the following:

- establishes the requirements for administration of the ambulatory surgical center assessment;
- describes how the amount of the assessment for each ambulatory surgical center is determined;
- details how the department will collect assessments;
- provides guidance regarding data required to be submitted to the department to determine assessment amounts; and
- specifies the filing, reporting, and payment deadlines for the assessment, and penalties imposed for failure to meet the requirements.

The fiscal effect of the assessment under s. 146.98 was included in the fiscal effect of 2009 Act 28. Therefore this rule has no fiscal effect.

