

WISCONSIN DEPARTMENT OF HEALTH SERVICES PROPOSED ORDER TO ADOPT RULES

The Wisconsin Department of Health Services (“the Department”) proposes an order to: **repeal** DHS 129.03 (31), 129.07 (1m) and (2) (bm); and **to repeal and recreate** DHS 129.03 (30m), 129.07 (1), and (2) (b) 1.; relating to nurse aide training program requirements.

RULE SUMMARY

Statute interpreted

Not applicable.

Statutory authority

Sections 146.40 (3), (3g) and (5), and 227.11 (2) (a), Stats.

Explanation of agency authority

The Department’s authority to promulgate rules is as follows:

Section 146.40 (3), (3g) and (5), Stats.:

(3) Except as provided in sub. (4d), the department shall approve instructional programs for nurse aides that apply for, and satisfy standards for, approval that are promulgated by rule by the department. The department may not require an instructional program to exceed the federally required minimum total training hours or minimum hours of supervised practical training under 42 CFR 483.152 (a). The department shall review the curriculum of each approved instructional program at least once every 24 months following the date of approval to determine whether the program continues to satisfy the standards for approval. Under this subsection, the department may, after providing notice, suspend or revoke the approval of an instructional program or impose a plan of correction on the program if the program fails to satisfy the standards for approval or operates under conditions that are other than those contained in the application approved by the department.

(3g) Except as provided in sub. (4d), the department shall approve instructional programs for nurse aides that apply for approval; that satisfy standards for approval that are promulgated by rule by the department; and that allow an individual who has successfully completed an instructional program for nurse aides in another state to receive instruction in this state that, when combined with the instructional program in the other state, will result in the individual having received substantially the same instruction as an individual who successfully completes an instructional program approved under sub. (3). Only an individual so described may complete an instructional program for nurse aides that is approved under this subsection. The department shall review the curriculum of each approved instructional program at least once every 24 months following the date of approval to determine whether the program continues to satisfy the requirements of this subsection. Under this subsection, the department may, after providing notice, suspend or revoke the approval of an instructional program or impose a plan of correction on the program if the program fails to satisfy the requirements of this subsection or operates under conditions that are other than those contained in the application approved by the department.

(5) (a) The department shall promulgate rules specifying standards for approval in this state of instructional programs and competency evaluation programs for nurse aides. The standards shall include specialized training in providing care to individuals with special needs.

(b) The department shall promulgate rules specifying criteria for acceptance by this state of an

instructional program and a competency evaluation program that is certified in another state, including whether the other state grants nurse aide privileges to persons who have completed instruction in an instructional program that is approved under sub. (3) and whether one of the following is true:

1. If the other state certifies instructional programs and competency evaluation programs for nurse aides, the state's requirements are substantially similar, as determined by the department, to certification requirements in this state.
2. If the other state certifies nurse aides, that state's requirements are such that one of the following applies:
 - a. The instructional programs required for attendance by persons receiving certificates are substantially similar, as determined by the department, to instructional programs approved under sub. (3).
 - b. The competency evaluation programs required for successful completion by persons receiving certificates are substantially similar, as determined by the department, to competency evaluation programs approved under sub. (3m).

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

(2) Rule making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Related statute or rule

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Plain language analysis

The purpose of the rulemaking is to revise portions of ch. DHS 129 to comply with 2019 Wis. Act 185 (“Act 185”), which amended s. 146.40 (3), Stats., regarding length of instructional hours for nurse aide training programs.

Section 146.40 (3), Stats., requires that the Department establish standards, by rule, for the approval of instructional programs for individuals applying to be nurse aides in the state of Wisconsin. Section 146.40

(3g), Stats., requires that the Department establish standards, by rule, for the approval of instructional programs for nurse aides who have successfully completed an instructional program for nurse aides in another state that, when combined with instruction received from another state, provide instruction that is substantially equivalent to instruction received through a program developed under s. 146.40 (3), Stats.

Rules previously promulgated by the Department under s. 146.40 (3) and (3g) require that, before a nurse aide can be employed in Wisconsin, they must complete 120 hours of instruction, including 32 clinical hours, through a Department-approved program. *See* ss. DHS 129.03 (30m) (a) and 129.07 (2) (b). An individual who has completed nurse aide training in another state may be approved if they complete an instructional program—referred by rule as the “45-hour training program” in s. DHS 129.03 (30m) (b)—which, combined with the instruction received in the other state, amounts to receiving substantially the same instruction as Wisconsin’s 120-hour training program.

Act 185 added an additional requirement in s. 146.40 (3), Stats., that “[t]he department may not require an instructional program to exceed the federally required minimum total training hours or minimum hours of supervised practical training under 42 CFR 483.152 (a).” 42 CFR 483.152 (a) provides that “[f]or a nurse aide training and competency evaluation to be approved by the State, it must, at a minimum . . . [c]onsist of no less than 75 clock hours of training.” At least 16 hours of those 75 hours must be supervised practical training.

The Department proposes to revise portions of ch. DHS 129 in order to make the required minimum number of training hours consistent with the federally required minimum total training hours under 42 CFR 483.152 (a). Further, the department proposes to eliminate the references to the 45-hour training program in ch. DHS 129, as the 45-hour training program is no longer needed to bridge the gap between the 120 hours of instruction and the 75-hour federal minimum since Wisconsin has adopted the federal 75-hour minimum.

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

Federal conditions of participation for the registry of nurse aides, nurse aide training and testing programs, and training of paid feeding assistants are contained in 42 CFR 483.150 to 483.160. These regulations establish conditions and standards for the approval of nurse aide training and competency evaluation programs, for the maintenance and operation of a registry, and for conducting training and testing programs for nurse aides and paid feeding assistants.

State and federal regulations for registry services and training and testing of nurse aide and paid feeding assistants are comparable, however the department previously supplemented these requirements through rulemaking to address therapeutic interventions and non-pharmacological pain control interventions, techniques of restorative nursing, client rights and reporting abuse or neglect of a client or misappropriation of a client’s property.¹

Comparison with rules in adjacent states

Illinois:

Illinois adopted significant portions of the federal regulation including the standards for the denial, suspension and revocation of program approval in 77 Admin Code 395, Long-Term Care Assistants and Aides Training Programs Code. Illinois specifies a comprehensive list of topics that must be addressed in any approved program including patient rights, communication, psychological needs of patient and family, hand washing, body mechanics, basic anatomy, nutrition, etc. Each set of topics includes course objectives and proficiency measures.

¹ *See* CR 16-088, which became effective on October 1, 2017, available at https://docs.legis.wisconsin.gov/code/chr/all/cr_16_088.

Iowa:

Iowa Code Chapter 81 – 16 Nurse Aide Requirements and Training and Testing Program closely mirrors federal requirements by including standards for denial, suspension and revocation of program approval. Like Illinois, Iowa code contains an extensive list of topics that must be included in any approved training program including bathing, dressing, toileting, assistance with eating, skin care, transfers, responding to behaviors, restorative care, and avoiding the need for restraints.

Michigan:

Michigan has no state rule regarding certified nurse aide training programs or maintenance of a registry and relies solely on federal regulation.

Minnesota:

Minnesota has no state rule regarding certified nurse aide training programs or maintenance of a registry and relies solely on federal regulation.

Summary of factual data and analytical methodologies

The department considered criteria that were approved by the Wisconsin Small Business Regulatory Review Board to determine whether the proposed rules have a significant economic impact on a substantial number of small businesses. A proposed rule is understood to have an economic impact on a substantial number of small businesses if at least 10% of the businesses affected by the proposed rules are small businesses and if operating expenditures, including annualized capital expenditures, increase by more than the prior year's consumer price index, or revenues are reduced by more than the prior year's consumer price index. For the purposes of this rulemaking, 2020 is the index year. From February 2019 to February 2020, the Consumer Price Index for All Urban Consumers (CPI-U) rose 2.3 percent, a smaller increase than the 2.5-percent increase for the year ending January 2020.

Section 227.114 (1) (a), 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.

The Department's Division of Quality Assurance maintains nurse aide training options databases that contain demographic, licensing, program, and compliance history of nurse aide training programs and certified nurse aides in Wisconsin.

Analysis and supporting documents used to determine effect on small business

Nurse aide training programs are not defined by the North American Industry Classification System ("NAICS"), as most of these programs operate within the Wisconsin Technical College System or within a healthcare facility. Specific revenue, expense, and staffing data is therefore not available from this source. The Department instead relies on data obtained through the Division of Quality Assurance's nurse aide training options databases.

As of June 1, 2021, 120 nurse aide training programs are operated by various entity types within state. The type of entity and number of programs is provided below:

- Nursing homes – 26
- Wisconsin technical colleges - 56
- High schools - 4
- Home health agency - 1
- Hospitals - 8
- Facilities serving people with developmental disabilities - 4
- Universities - 2
- Private - 18
- United States Department of Agriculture (USDA) Forest Service - 1

Based on a review of Department licensing data, including financial reports submitted by the entities, Medicaid reimbursement data, number of beds and whether the entity is a part of a larger healthcare organization, the Department has determined that the affected nursing homes, hospitals and facilities serving people with developmental disabilities are not small businesses as defined by s. 227.114 (1) (a), Stats., because they employ more than 25 full-time employees and have gross annual sales of more than \$5,000,000. Additionally, the technical colleges, high schools, universities and the USDA Forest Service also do not meet the definition of a small business because they employ more than 25 full-time employees and have gross annual sales of more than \$5,000,000.

Effect on small business

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

Agency contact person

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Statement on quality of agency data

The data sources used to draft the rules and analyses are accurate, reliable and objective, and are listed in the summary of factual data and analytical methodologies section of this rule order.

Place where comments are to be submitted and deadline for submission

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The notice of public hearing and deadline for submitting comments will be published in the Wisconsin Administrative Register and to the department's website, at <https://www.dhs.wisconsin.gov/rules/active-rulemaking-projects.htm>. Comments may also be submitted through the Wisconsin Administrative Rules Website, at: <https://docs.legis.wisconsin.gov/code/chr/active>.

RULE TEXT

SECTION 1. DHS 129.03 (30m) is repealed and recreated to read:

DHS 129.03 (30m). "Nurse aide training program" means an instructional program for a nurse aide that is approved by the department as mandated by s. DHS 146.40 (3) or (3g), Stats.

SECTION 2. DHS 129.03 (31) is repealed.

SECTION 3. DHS 129.07 (1) (title) and (intro.) are repealed and recreated to read:

DHS 129.07 (1) CURRICULUM FOR A NURSE AIDE TRAINING PROGRAM. (1) The training program shall include theory and practice in all of the following care areas:

SECTION 4. DHS 129.07 (1m) is repealed.

SECTION 5. DHS 129.07 (2) (b) (title) and 1. are repealed and created to read.

DHS 129.07 (2) (b) *Program standards for training programs.*

1. A training program shall include at least 75 training hours as required under 42 CFR 483.152 (a). At least 16 of those 75 training hours must be in a clinical experience in a clinical setting as required under 42 CFR 483.152 (a) and approved by the department. The first 16 hours of

training shall be provided in a classroom setting before a student has direct contact with clients. Tours of a facility, including observations of clients and day-to-day facility activities, may be incorporated into the classroom hours. Competency evaluation under s. DHS 129.08 and provider orientation may not be counted toward meeting the 75-hour minimum requirement.

SECTION 6. DHS 129.07 (2) (bm) is repealed.

SECTION 7. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Health Services

Dated: _____

Karen Timberlake, Secretary-designee

SEAL: