

**BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
OF THE
NORTH DAKOTA LEGISLATIVE COUNCIL**

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| N.D. Admin. Code Chapter |) | <u>REPORT OF THE</u> |
| 75-02-07.1, Ratesetting for |) | <u>DEPT. OF HUMAN SERVICES</u> |
| Basic Care Facilities |) | March 13, 2018 |
| (Pages 404-414) |) | |

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For its report, the North Dakota Department of Human Services (Department) states:

1. The proposed amendments to N.D. Admin. Code chapter 75-02-07.1 are being amended as a result of 2017 House Bill No. 1012.
2. These rules are not related to changes in a federal statute or regulation.
3. The Department uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service board directors, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the Department. Additionally, the Department constructs relevant mailing lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rule-making. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments.

4. A public hearing on the proposed rules was held in Bismarck on December 6, 2017. The record was held open until 5:00 p.m. on December 18, 2017, to allow written comments to be submitted. No comments were received at the public hearing. One written comment was received within the comment period. A "Summary of Comments" is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was \$2,309.48.
6. The proposed rules amend chapter 75-02-07.1. The following specific changes were made:
 - Section 75-02-07.1-01** is amended to update the definitions of "personal care rate" and "room and board rate" by adding language regarding per diem rate.
 - Section 75-02-07.1-05** is amended to update the number of days allowed per occurrence for payment of the room and board rate for medical care leave.
 - Section 75-02-07.1-07** is amended to add medical director to administration costs.
 - Section 75-02-07.1-09** is amended to add an additional category direct cost.

Section 75-02-07.1-14 is amended to establish top management personnel compensation for facilities licensed prior to July 1, 2016.

Section 75-02-07.1-22 is amended to update the year and rate limitations.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments are expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.
9. Based on the fiscal estimates prepared during the 2017 Legislative Assembly for House Bill No. 1012 and the increase to the limit rates and the increase in medical care leave days, the expected fiscal impact on Long Term Care is \$375,683 (total funds) and \$373,500 (general funds) for calendar year 2018.
10. A constitutional takings assessment was prepared and is attached to this report.
11. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Jonathan Alm
Legal Advisory Unit
North Dakota Department of Human Services
March 9, 2018



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Doug Burgum, Governor
Christopher Jones, Executive Director

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED AMENDMENTS TO N.D. ADMIN. CODE CHAPTER 75-02-07.1 RATESETTING FOR BASIC CARE FACILITIES

The North Dakota Department of Human Services (the Department) held a public hearing on December 6, 2017, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapter 75-02-07.1, Ratesetting for Basic Care Facilities.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 18, 2017.

No one provided comments at the public hearing. One written comment was received within the comment period. The commentor was:

1. Shelly Peterson, President, North Dakota Long Term Care Association, 1900 north 11th St, Bismarck ND 58501

SUMMARY OF COMMENTS

Comment: On page 5 regarding cost allocations, we recommend the new wording be changed from and resident care costs for a facility to and resident care salaries for a facility. The allocation for the remaining costs in this category are covered by 1.a.4 which requires other resident care costs to be allocated based upon resident days.

Response:

The Department will update the proposed amendment to subsection 1(c) of section 75-02-07.1-09 to the following:

75-02-07.1-09. Cost allocations.

1. Direct costing of allowable costs must be used whenever possible. For a facility that cannot direct cost, the following allocation methods must be used:
 - c. Malpractice, professional liability insurance, therapy salaries, and purchased therapy services, and resident care salaries and benefits costs for a facility combined with an optional Alzheimer's, dementia, special memory care or traumatic brain injury facility or unit must be direct costed.

N.D. Admin. Code Chapter 75-02-07.1
Summary of Comments
January 4, 2018

Comment: On page 6 regarding compensation, the comma in the second to last line on the new wording, for e. needs to be deleted. This makes the language consistent with section d. above this new section. We appreciate the department adding this new subsection to bring equality and fairness to basic care facilities as part of a larger organization.

Response:

The Department will update the proposed amendment to subsection 1(e) of section 75-02-07.1-14 to remove the comma.

Prepared by:

Jonathan Alm, Director
Legal Advisory Unit
N.D. Dept. of Human Services

In Consultation with: LeeAnn Thiel, Medical Services

January 4, 2018

cc: LeeAnn Thiel, Medical Services
Maggie Anderson, Medical Services

MEMO

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: LeeAnn Thiel, Administrator, Medicaid Payment and Reimbursement Services, Medical Services

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-07.1

DATE: September 7, 2017

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to the proposed amendments to North Dakota Administrative Code Article 75-02-07.1. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The amendments increase in the number of allowable medical leave days and the direct and indirect care limits pursuant to 2017 HB 1012 and in accordance with N.D.C.C. § 50-24.5-02.3. The amendments also identify ongoing program updates and clarifications.

Classes of Persons Who Will be Affected

Basic care facility operators and basic care facility residents will be affected by the proposed rule changes since some of the changes affect components of the ratesetting process for basic care facilities.

Probable Impact

The SFY 2018 estimated impact of the changes to North Dakota Medical Services is expected to be \$375,683. The Department's 2017-2019 budget approved by the 2017 Legislative Assembly included an appropriation for the increase in these limits.

The probable cost to private persons and consumers who are affected by the proposed rules cannot be determined. The proposed amendments affect the

rates established for basic care facilities participating in Medicaid and the Basic Care Assistance program. The rate established may only be paid if the rate charged to private pay residents is equal to or exceeds the rate established. The basic care facility may determine the rate charged to private pay individuals which may be changed by the proposed amendments.

Probable Cost of Implementation

The amendments become part of existing rules on ratesetting and there are no additional costs associated with implementing the rule changes.

Consideration of Alternative Methods

The Department did not consider whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules.

MEMORANDUM

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: LeeAnn Thiel, Administrator, Medicaid Payment and Reimbursement Services, Medical Services

DATE: September 7, 2017

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-07.1

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to the proposed amendments to N.D. Admin. Code chapter 75-02-07.1. The proposed rules are not mandated by federal law.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rules' impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The only small entities affected by the proposed amendments are licensed basic care facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually and who participate in the Medicaid program. The proposed amendments affect components of the ratesetting processes for basic care facilities that are applied to costs reported by the entities. Because all costs must be considered when establishing limits used in the rate setting process, facilities, including facilities that are considered to be small entities, must file a uniform annual cost report. The proposed amendments do not alter the uniform cost reporting requirements necessary to establish the rates for all basic care facilities in the state that choose to participate in Medicaid and therefore establishment of less stringent compliance or reporting requirements for these small entities was not considered.

2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter any required schedules or deadlines for the uniform cost reporting requirements and therefore establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter any uniform cost reporting requirements, therefore, consolidation or simplification of compliance or reporting requirements for these small entities was not considered.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

The proposed amendments do not affect any design or operational standards in existence for these small entities, therefore, establishment of new performance standards were not considered.

5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the Proposed Rules

The requirements of the proposed amendments are applicable to all basic care facilities that choose to participate in Medicaid and have a rate established for payment of services. Entities choosing not to participate in Medicaid would not be impacted by the proposed amendments.

MEMORANDUM

TO: Jonathon Alm, Director, Legal Advisory Unit

FROM: LeeAnn Thiel, Administrator, Medicaid Payment and Reimbursement Services, Medical Services

DATE: September 7, 2017

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-07.1

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code chapter 75-02-07.1. The proposed rules are not mandated by federal law. The proposed rules are not anticipated to have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are licensed basic care facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually and who participate in the Medicaid program.

There are no other small entities subject to the proposed amendments.

2. Costs For Compliance

Administrative and other costs required of basic care facilities for compliance with the proposed amendments are expected to be zero. The proposed amendments affect only the rate calculation used to establish the rates payable by individuals in basic care facilities and do not affect compliance requirements.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rules cannot be determined. The proposed amendments affect the rates established for basic care facilities participating in Medicaid and the Basic Care Assistance program. The rate established may only be paid if the rate

charged to private pay residents is equal to or exceeds the rate established. The basic care facility may determine the rate charged to private pay individuals which may be changed by the proposed amendments.

Since the proposed amendments do not apply to private persons and consumers there is no estimated probable benefit.

4. Probable Effect on State Revenue

The probable effect of the proposed rules on state revenues is expected to increase consistent with the state's federal medical assistance percentage.

5. Alternative Methods

The Department did not consider whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules.

FISCAL IMPACT

Based on the fiscal estimates prepared during the 2017 Legislative Assembly for House Bill No. 1012 and the increase to the limit rates and the increase in medical care leave days, the expected fiscal impact on Long Term Care is \$375,683 (total funds) and \$373,500 (general funds) for calendar year 2018.



Doug Burgum, Governor
Christopher Jones, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendments to N.D. Admin. Code chapter 75-02-07.1.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.
2. The purpose of this proposed rule is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.
3. The reasons this proposed rule is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than \$0.
5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.
6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

Dated this 7th day of September, 2017.

by:

A handwritten signature in black ink, appearing to be "C. Jones", is written over a horizontal line.

N.D. Dept. of Human Services