

**WISCONSIN DEPARTMENT OF HEALTH SERVICES
PROPOSED ORDER TO ADOPT PERMANENT RULES**

The Wisconsin Department of Health Services proposes an order to: **repeal** DHS 122.05 (1) (c); **amend** DHS 122.06 (4) (b) (Note) and (d) 5. (Note), (4m) (a) (Note) and (b) 3. (Note), 122.07 (1) (d) 3. (Note) and (2) (a) (intro.), 122.08 (2) (a) and (Note); and **create** DHS 122.06 (2m), 122.07 (3), and 122.09 (9), relating to redistribution of closed nursing home beds.

RULE SUMMARY

Statutes interpreted

Sections 150.33, 150.31, and 150.40, Stats.

Statutory authority

Sections 150.03, 150.31 (5), (6) and (8), and 150.39, Stats.

Explanation of agency authority

Under s. 150.03, Stats., the department is required to “adopt rules and set standards” regarding resource allocation in long-term care facilities. Resource allocation includes establishing the licensed nursing home bed cap limits under s. 150.31, Stats., and redistribution of nursing home beds due to closure under s. 150.40, Stats.

Section 150.31 (1) to (4) and (5m) to (5t), Stats., establish specific requirements for establishing and administering the statewide nursing home bed limit. Sections 150.31 (5), (6), and (8), Stats., permit the Department to create rules, respectively, regarding decreasing the bed limit, limiting the number of nursing home beds converted to beds for individuals with developmental disabilities, and the criteria for allocating or distributing beds. Section 150.39, Stats., further sets out criteria that the Department must consider when reviewing an application for available nursing home beds and permits the Department to establish “additional criteria . . . by rule.” These provisions, combined with the requirement to promulgate rules under s. 150.03, Stats., form the primary authority for ch. DHS 122.

Section 150.40, Stats., further permits the Department to “redistribute within a county the nursing home beds made available as a result of nursing home closure within that county” if : (a) the number of other nursing home beds for each 1,000 persons 65 years or older in the county is less than 80% of the statewide average for each 1,000 persons age 65 years or older; and (b) the total occupancy level for the other nursing homes in the county is equal to or more than the statewide average nursing home occupancy rate. In accordance with the grant of authority under s. 150.03, Stats., and to effectuate s. 150.40, Stats., the Department promulgated rules in s. DHS 122.05 (1) (c) to establish standards for redistribution of closed nursing home beds.

Related statute or rule

Chapter DHS 83, relating to community-based residential facilities (“CBRFs”)
Chapter DHS Chapter DHS 131, relating to hospices.
Chapter DHS 132, relating to nursing homes.
Chapter DHS 134, relating to facilities serving people with developmental disabilities.

Plain language analysis

The proposed rules will resolve conflicts between s. 150.40, Stats., and provisions in ch. DHS 122 related to the redistribution of closed nursing home beds. Section 150.40, Stats., states that, upon closure of a

nursing home, the Department may redistribute those beds within the same county if the number of nursing home beds for each 1,000 persons age 65 or older is less than 80% of the statewide average and the total occupancy level for other nursing homes in the county is equal to or more than the statewide average nursing home occupancy rate.

Section DHS 122.05 (1) (c), which has not been substantially revised since 1987,¹ states that “applications to replace or redistribute closed beds may be submitted only from counties which are eligible to compete for new beds under par. (b).” Section DHS 122.05 (1) (b) provides that the only applicants who are eligible to apply for new beds are those whose projects are in counties where “[t]he countywide occupancy rate . . . is greater than 94%,” and allows redistribution to “the planning area in which they were originally located.” The occupancy rate provided in rules is significantly higher than the 80% threshold required by s. 150.40, Stats., and only one Wisconsin County currently meets or exceeds the 94% provided in the rule—thereby rendering it virtually impossible to redistribute nursing home beds under the rule as written. Additionally, the restriction to the “planning area” conflicts with the statutory authority to redistribute within the county in which the closed beds are located. Additional application review and selection criteria provided in s. DHS 122.07, which supplement the baseline criteria required under s. 150.39, Stats., also inhibit the Department’s ability to redistribute closed nursing home beds under s. 150.40, Stats.

Given the ongoing need to permit redistribution of closed nursing home beds in Wisconsin, the Department proposes to repeal s. DHS 122.05 (1) (c) and related rules regarding applications to allow nursing home beds to be redistributed in accordance s. 150.40, Stats. If promulgated, the standards for redistribution under s. 150.40, Stats., and application and review criteria under ss. 150.33, 150.35, and 150.39, Stats., would apply to redistribution of closed nursing home beds.

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

Federal regulations do not set numerical limits on the number of beds in individual nursing homes, or the overall number of nursing home beds licensed within each state. Federal regulations instead establish minimum staffing requirements and standards of care to maintain the health and safety of residents. *See* 42 CFR 483.5 and 483.10 to 483.75.

Comparison with rules in adjacent states

Illinois:

Illinois does not limit the total number of nursing home beds, but a certificate of need (“CON”) permit must be obtained from the Illinois Health Facilities & Services Review Board (“HFSRB”) before an applicant does any of the following: (1) adds new category of service; (2) substantially increases its bed capacity; (3) substantially changes the scope of functional operation of a facility; or (4) Commences capital expenditures is above established thresholds (\$8.9 million for long-term care facilities). 20 ILCS 3960/1 *et seq.* The HFSRB is responsible for issuing permits for construction or modification projects proposed by healthcare facilities. The Board is an independent nine-member commission appointed by the Governor with Illinois Senate confirmation. Facilities are required to obtain an exemption Long-term care facilities are not required to obtain a permit when closing or undergoing a change in ownership, although those transactions must be reported.

Iowa:

Iowa requires that its Health Facilities Council review applications for CON to expand services or licensed beds. IAC 10A.713. The criteria this council considers are provide in IAC 10A.714

¹ Clearinghouse Rule CR 86-180, which was published in Administrative Register 373B on Jan. 31, 1987, repealed and recreated s. DHS 122.05 (1) (c). A copy of the rule order for CR 86.180 is available at: https://docs.legis.wisconsin.gov/code/register/1987/373b/rules/cr_86_180.pdf.

Michigan:

Michigan does not have an express statewide numerical limit for nursing home beds, but instead imposes statewide CON standards. A provider must demonstrate to an independent 11-member commission a need for additional services or beds to the and obtain a CON from that commission before an applicant constructs, upgrades, relocates, or acquires a facility, or otherwise increases the number of licensed beds. MCL s. 333.22209. Whether a CON is appropriate is tied to average occupancy rates. *See* Michigan Department of Health and Human Services, *Certificate of Need (CON) Review Standards for Nursing Home and Hospital Long-Term Care Unit Beds*, available at https://www.michigan.gov/-/media/Project/Websites/mdhhs/Doing-Business-with-MDHHS/Health-Care-Providers/Certificate-of-Need/CON-Review-Standards/NH-Review-Standard-Docs/NH_Standards.pdf?rev=b0806264982443ddb87b1276c870126a.

Minnesota:

Minnesota currently has a moratorium on licensing or certifying new nursing home bed certifications and construction projects that exceed \$1,000,000. *See* Minn. Stat. s. 144A.071. Section 144A.073, Minn. Stats., permits exceptions to the moratorium, which must be applied for, considered by the interagency long-term care planning committee, and ultimately approved by the Minnesota Commissioner of Health. *See* Minn. Stat. ss. 144A.071 144A.073; *see also* Minn. R. pp. 4655.1070 to 4655.1098. Exceptions to the nursing home moratorium that were granted between 2022 and 2025 are listed on the Minnesota Department of Health’s website at: <https://www.health.state.mn.us/facilities/regulation/nursinghomes/moratoriumapp/index.html>.

Summary of factual data and analytical methodologies

The Department’s rules conflict with the standards s. 150.40, Stats., and the proposed rules will ensure the process for redistributing closed nursing home beds conforms to the statute. To determine county nursing home occupancy rates, the Department relied on data from its Division of Quality Assurance that was compiled using the CMS 671 form titled “Long-Term Care Facility Application for Medicare and Medicaid.”

Analysis and supporting documents used to determine effect on small business

The Department relied on data compiled through the CMS 671 form, and data from the Department’s Division of Medicaid Services to determine how many nursing homes in Wisconsin meet the definition of a “small business” under s. 227.114 (1), Stats.

Effect on small business

In accordance with s. 227.114 (1), Stats., Wisconsin nursing homes do not employ 25 or fewer employees, and there are nursing homes with gross annual sales of less than \$5,000,000. If one of those nursing homes chose to apply for, and was granted, redistributed bed licenses, it would increase the number of residents the nursing home serves, which would ultimately increase revenue. Increasing bed numbers would also benefit small businesses who work at with the nursing home to provide food or supplies or perform renovations to accommodate the increased number of beds.

Agency contacts

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Statement on quality of agency data

The data used by the Department to prepare these proposed rules and analysis comply with s. 227.14 (2m), Stats.”

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 122.05 (1) (c) is repealed.

SECTION 2. DHS 122.06 (2m) is created to read:

DHS 122.06 (2m) EXEMPTION. This section shall not apply to applications to redistribute closed nursing home beds in accordance with s. 150.40, Stats.

SECTION 3. DHS 122.06 (4) (b) (Note), (d) 5. (Note), (4m) (a) (Note) and (b) 3. (Note) are amended to read:

DHS 122.06 (4) (b) **Note:** For copies of application forms, contact: ~~Resource Allocation Program, the Division of Health Care Access and Accountability, P.O. Box 309, Madison, Wisconsin 53701~~ Quality Assurance at dhsdqabnhrclicensing@dhs.wisconsin.gov or (608) 266-1865.

DHS 122.06 (4) (d) 5. **Note:** Upon written request, the department will provide technical assistance to any small business, as defined in s. 227.114 (1), Stats., or other small organization with fewer than 25 full-time employees or annual revenues of less than ~~\$2,500,000~~ \$5,000,000 regarding application materials and procedures. Requests should be sent to the ~~Resource Allocation Program, Division of Health Care Access and Accountability, P.O. Box 309, Madison, Wisconsin 53701~~ Quality Assurance at dhsdqabnhrclicensing@dhs.wisconsin.gov or (608) 266-1865.

DHS 122.06 (4m) (a) **Note:** For copies of the application forms, contact the ~~Resource Allocation Program, Division of Health Care Access and Accountability, P.O. Box 309, Madison, Wisconsin 53701~~ Quality Assurance at dhsdqabnhrclicensing@dhs.wisconsin.gov or (608) 266-1865.

DHS 122.06 (4m) (b) 3. **Note:** Upon written request, the department will provide technical assistance to any small business, as defined in s. 227.114 (1), Stats., or other small organization with fewer than 25 full-time employees or annual revenues of less than ~~\$2,500,000~~ \$5,000,000 regarding application materials and procedures. Requests should be sent to the ~~Resource Allocation Program, Division of Health Care Access and Accountability, P.O. Box 309, Madison, Wisconsin 53701~~ Quality Assurance at dhsdqabnhrclicensing@dhs.wisconsin.gov or (608) 266-1865.

SECTION 4. DHS 122.07 (1) (d) 3. (Note) and (2) (a) (intro.) are amended to read:

DHS 122.07 (1) (d) 3. **Note:** Copies of the life-cycle cost analysis form are included in the application materials. They may be obtained from the ~~Resource Allocation Program, Division of Health Care Access and Accountability, P.O. Box 309, Madison, Wisconsin 53701~~ Quality Assurance at dhsdqabnhrclicensing@dhs.wisconsin.gov or (608) 266-1865.vvv

DHS 122.07 (2) Applications for new ~~or redistributed~~ beds which meet all of the criteria in sub. (1) shall be subject to the following final selection process:

SECTION 5. DHS 122.07 (3) is created to read:

DHS 122.07 (3) EXEMPTION. This section does not apply to applications to redistribute nursing home beds in accordance with s. 150.40, Stats.

SECTION 6. DHS 122.08 (2) (a) and (Note) are amended to read:

DHS 122.08 (2) (a) An applicant, including an applicant for redistribution of closed nursing home beds under s. 150.40, Stats., desiring a public hearing shall file a written request for a public hearing, no later than 10 days after the issuance of the initial finding, to both the department's division of ~~health care financing~~ quality assurance and the department of administration's division of hearings and appeals.

Note: ~~The Division of Health Care Financing has been renamed the Division of Health Care Access and Accountability~~ Quality Assurance. The mailing address of the Department's Requests should be sent to the Division of Health Care Access and Accountability is P.O. Box 309 2969, Madison, Wisconsin 53701 of Quality Assurance at dhsdqabnhrclicensing@dhs.wisconsin.gov or (608) 266-1865. and the mailing address of the Requests should be sent to the Division of Hearings and Appeals P.O. Box 7875, 4822 Madison Yards Way, Fifth Floor, Madison, Wisconsin 53707 53705, or DHAMail@wisconsin.gov, or faxed to (608) 264-9885.

SECTION 7. DHS 122.09 (9) is created to read:

DHS 122.09 (9) EXEMPTION. This section does not apply to applications to redistribute nursing home beds in accordance with s. 150.40, Stats.

SECTION 8. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2) (intro.), Stats.