

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

N.D. Admin. Code Chapter 75-02-02.1, Eligibility for Medicaid (Pages 362-394)))))	<u>REPORT OF THE</u> <u>DEPT. OF HUMAN SERVICES</u> March 11, 2014
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For its report, the North Dakota Department of Human Services states:

1. The proposed amendments to N.D. Admin. Code chapter 75-02-02.1 are necessary to comply with 2013 House Bill No. 1232 and 2013 House Bill No. 1012.
2. These rules are not related to changes in a federal statute or regulation.
3. The Department of Human Services (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 27, 2013. The record was held open until 5:00 p.m. on January 6, 2014, to allow written comments to be submitted. No comments were received. The "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 \$2,204.72.
6. The proposed rules amend chapter 75-02-02.1. The following specific changes were made:
 - Section 75-02-02.1-28. Section 75-02-02.1-28 is amended to correct a typo, reflect eligibility requirements enacted in 2013 House Bill No. 1232 regarding the value of an irrevocable burial arrangement, and to exempt funds held in a qualified individual retirement account from medicaid eligibility considerations.
 - Section 75-02-02.1-32. Section 75-02-02.1-32 is amended to add language regarding mineral interests in eligibility determinations and to clarify valuation of contractual right to receive money payments.
 - Section 75-02-02.1-33.2. Section 75-02-02.1-33.2 is amended to clarify the criteria for establishing the period of medicaid ineligibility resulting from a disqualifying transfer.

Section 75-02-02.1-40. Section 75-02-02.1-40 is amended to increase the income level to sixty-five dollars per month for individuals in a nursing facility and for an institutionalized spouse with an ineligible community spouse, as provided within 2013 House Bill No. 1012.

Section 75-02-02.1-43. Section 75-02-02.1-43 is created to address the treatment of payments for services by the attorney-in-fact in assessing an individual's eligibility.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The proposed 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. The anticipated fiscal impact resulting from the implementation of the changes to section 75-02-02.1-40 of the proposed amendments is \$1,118,175, of which \$594,512 is the general fund impact. This impact is reflected in the Department's 2013-2015 Budget. There is no anticipated fiscal impact resulting from the implementation of the other proposed amendments.
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:

Julie Leer
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North Dakota Department of Human Services
March 11, 2014



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Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTER 75-02-02.1
ELIGIBILITY FOR MEDICAID**

The North Dakota Department of Human Services held a public hearing on Friday, December 27, 2013, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code Chapter 75-02-02.1, Eligibility for Medicaid.

Written comments on these proposed amendments could be offered through 5:00 p.m. on Monday, January 6, 2014.

One individual attended the public hearing but no one provided comments. No written comments were received within the comment period.

SUMMARY OF COMMENTS

No comments were received.

There will be no change to the proposed rule as no comments were received.

Prepared by:

Julie Leer, Director
Legal Advisory Unit
N.D. Dept. of Human Services

January 7, 2014

Cc: Cindy Sheldon, Medical Services

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Mark McClenning, Director, Medicaid Eligibility Policy

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-02.1

DATE: October 25, 2013 (Revised March 6, 2014)

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed amendments to North Dakota Administrative Code Article 75-09.1. These amendments are anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The purpose of these rules is to fulfill the requirements of N.D.C.C. § 28-32-08. This impact statement pertains to proposed amendments to N.D. Admin. Code chapter 75-02-02.1.

Classes of Persons Who Will be Affected

The classes of persons who will most likely be affected by these rules are:

1. Medicaid beneficiaries.

This group will be affected by:

- Updated criteria for establishing eligibility;
- Treatment of qualified retirement plans as an excluded asset for beneficiaries in eligibility determinations;
- Change in valuation of prior mineral interests for eligibility determinations;
- Clarification of criteria for determining whether a contractual right to receive money is collectable so as to be determined an asset for eligibility determinations; and
- Change in the amount of irrevocable pre-need funeral funds that are excluded from consideration in eligibility determinations.

Probable Impact

The proposed amendments may impact the regulated community as follows:

- Beneficiaries may have more excluded assets for eligibility determinations;
- Beneficiaries may be subject to higher valuation of past mineral rights for eligibility determinations; and
- Beneficiaries may exclude retirement plans from assets subject to eligibility determinations.

Probable Cost of Implementation

No cost of implementation.

Consideration of Alternative Methods

A review of Medicaid policies, federal and state laws, which lead to the proposed amendments, was undertaken to determine the best approach to changes. The review included a discussion of current policy, possible alternatives, and recommendations to the Department.



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

MEMORANDUM

TO: Julie Leer, Legal Advisory Unit Director

FROM: Mark McClenning, Director, Medicaid Eligibility Policy

DATE: October 25, 2013

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-02.1.

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 proposed amendments to N.D. Admin. Code chapter 75-02-02.1.

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 these proposed amendments are Medicaid beneficiaries and applicants. Applicants will have more opportunity for the exclusion of assets in Medicaid eligibility determinations as criteria for these determinations have become more liberalized. However, past mineral interests will be valued at a higher level than previously in eligibility determinations.

The proposed amendments support Medicaid program integrity by requiring a higher valuation of mineral interests, thereby reducing eligibility determinations for those applicants who possess adequate financial means to pay for their own care. The reporting requirements have not changed.

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

The proposed amendments will not alter in any material way any required schedules or deadlines for compliance.

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

The proposed amendments will not alter in any material way any required compliance or reporting requirements. For this reason, the establishment of less stringent schedules or deadlines for 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 design and operational standards required in the proposed rules will not change.

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

There are no exceptions to the proposed rules, other than those explicitly stated in the rule itself.

Dalrymple, Governor
Liz D. Anderson, Executive Director

MEMORANDUM

TO: Julie Leer, Legal Advisory Unit Director

FROM: Mark McClenning, Director, Medicaid Eligibility Policy

DATE: October 25, 2013

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-02.1.

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 Administrative Code chapter 75-02-02.1.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are Medicaid beneficiaries.

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rules are expected to be: no administrative or other costs are required by the small entities for compliance with the proposed rules.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: most private persons or consumers are not expected to incur costs as a result of the proposed rules. However, there is a "potential" fiscal impact due to the proposed change in section 75-02-02.1-28 because some private retirement plans could be used by applicants to exclude otherwise countable assets. This potential impact would be limited to eligibility determinations for aged, blind and disabled populations because no other

Medicaid eligibility groups are subject to an asset test. Moreover, because this change limits private retirement plans to Internal Revenue Code (IRC) qualified plans, there are limits on the annual amounts that can be put into such plans. As such, any fiscal impact would be minuscule and is not able to be determined at this time.

Additionally, past mineral interests will now be valued at a higher level for eligibility determinations. Accordingly, an individual aged or disabled applicant, whose assets are taken into account for eligibility determinations, may be found ineligible in a small number of instances where previously the same applicant would have been eligible under prior asset valuation criteria.

The probable benefit to private persons and consumers who are affected by the proposed rule: there will be benefits to Medicaid recipients in that the program liberalizes some eligibility provisions. Moreover, the additions will work to prevent fraud and abuse in the Medicaid program.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: no increase in state expenditures due to implementation of the proposed rules.

5. Alternative Methods

The Department considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. Because small entities will not experience administrative costs or other costs, exploring alternative methods was not necessary.



Jack Dalrymple, Governor
Maggie D. Anderson, Interim Executive Director

TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapter 75-02-02.1.

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 25th day of October, 2013.

by: Julie Leen
N.D. Dept. of Human Services