



State of California—Health and Human Services Agency
Department of Health Care Services



EDMUND G. BROWN JR.
Governor

NOTICE OF PROPOSED RULEMAKING

SUBJECT: Estate Recovery, DHCS-08-012

NOTICE IS HEREBY GIVEN that the Department of Health Care Services (Department) proposes to amend California Code of Regulations (CCR), Title 22, Division 3, Chapter 2.5, Article 2, Sections 50961, 50962, and 50963, after considering all public comments, objections, and recommendations.

WRITTEN COMMENT PERIOD

Any interested person or his or her duly authorized representative may submit written comments to the Department relevant to the regulatory action described in this notice.

Please label any comments as pertaining to Estate Recovery, DHCS-08-012, and submit using any of the following methods:

Mail Delivery: Department of Health Care Services
Office of Regulations, MS 0015
P.O. Box 997413
Sacramento, CA 95899-7413

Hand Delivery: Department of Health Care Services
Office of Regulations
1501 Capitol Avenue, Suite 5084
Sacramento, CA 95814

FAX: (916) 440-5748

Email: regulations@dhcs.ca.gov

The written comment period closes at **5:00 pm, on October 27, 2014**; any written comments, regardless of the method of transmittal, must be received by the Office of Regulations by **5:00 pm** on this date for consideration.

Written comments should include the author's contact information so the Department can provide notification of any further changes to the regulation proposal.

A public hearing has not been scheduled for this rulemaking. However, the Department will conduct a hearing if a written request for a public hearing is received from any interested person or his or her duly authorized representative, no later than 15 days prior to the close of the written comment period, pursuant to Government Code Section 11346.8.

The Department shall consider all comments received regarding the proposal equally, whether submitted in writing or through oral testimony at a public hearing.

AUTHORITY AND REFERENCE

These regulations are being proposed under the following authorities:

Section 20, Health and Safety Code; and Sections 10725 and 14124.5, Welfare and Institutions (W&I) Code.

These regulations implement, interpret, or make specific the following:

Sections 1382c and 1396p(b), 42 USC; Section 14009.5, W&I Code; Sections 40, 215, 1215, 9201, 9202, 9203, 19202 and 19203, Probate Code; Sections 297, 297.5, 298, 298.5, 299.2 and 308, Family Code; Sections 1916-1 and 3287, Civil Code; California Constitution, Article I, Sections 1 and 7 and Article XV, Section 1; State Medicaid Manual HCFA-Pub. 45-3, Transmittal No. 65 §3810; *Belshe v. Hope* (1995) 33 Cal. App. 4th 161; *Dalzin v. Belshe* (N.D. Cal. 1997) 993 F. Supp. 732; *California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal. App. 4th 498; *Shewry v. Begil* (2005) 128 Cal.App.4th 639; *In re Marriage Cases* (2008) 43 Cal.4th 757; *Perry v. Brown* (9th Cir. 2013) 725 F.3d 1140; Section 2602(f) of the Patient Protection and Affordable Care Act of 2010, (Pub. L. No. 111-148); Section 115, Medicare Improvements for Patients and Providers Act of 2008 (Pub. L. No. 110-275); *Hollingsworth v. Perry* (2013) 570 U.S. 12-144; and *United States v. Windsor* (2013) 570 U.S. 12-307.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

W&I Code sections 10725 and 14124.5 authorize the Director of the Department to adopt, amend, or repeal regulations as necessary and proper to carry out the purposes and intent of the statutes governing the Medi-Cal program.

Existing federal and state law, Title 42 United States Code (USC) section 1396p and W&I Code section 14009.5, respectively, require the Department to seek reimbursement from the estates of deceased Medi-Cal beneficiaries, or from any recipient of the decedent's property by distribution or survival, for Medi-Cal paid services received on or after age 55, unless specific exemptions or other limitations apply. An estate is defined as those assets owned by the Medi-Cal beneficiary at the time of death, including assets distributed through joint tenancy, tenancy in common,

survivorship, life estate, living trust, annuities purchased on or after September 1, 2004, a life insurance policy that names the estate as the beneficiary or reverts to the estate, or any retirement account that names the estate as the beneficiary or reverts to the estate. The Department's estate recovery (ER) claims include nursing facility services, home and community-based services, and related hospital and prescription drug services. Federal law also allows states to recover for other services as specified in the State Plan. In California, these include all payments for health care premiums and services provided to Medi-Cal beneficiaries on or after age 55. The Department's claim is limited to the value of the decedent's assets or the amount of Medi-Cal paid services received by the decedent, whichever is less. Funds recovered through the ER program are returned to federal and state general funds, which finance the provision of benefits to eligible Medi-Cal beneficiaries.

Federal and state statutes, published court decisions, as described below, and Departmental policy modifications necessitate changes to CCR, title 22, Chapter 2.5, Third Party Liability, which includes ER provisions. By embodying the most current ER rules, the revisions to Chapter 2.5 will benefit those impacted by the ER program.

Effective January 2010, Section 115 of the Medicare Improvements for Patients and Providers Act (MIPPA) of 2008 (Pub. L. No. 110-275), requires states to exempt from ER Medicare cost-sharing benefits paid under Medicare Savings Programs (MSPs) per 42 USC section 1396p(b)(1)(B)(ii), for certain dual eligible groups age 55 and over.

Assembly Bill 205 (Chapter 421, Statutes of 2003) enacted Sections 297.5 and 299.2 of the Family Code, which adopted the California Domestic Partner Rights and Responsibilities Act (DPA) of 2003. The DPA affords a registered domestic partner (RDP) and two persons of the same sex having a validly formed legal union in another jurisdiction, other than a marriage, the same rights, protections, benefits, responsibilities, obligations, and duties that California law affords to a married man and woman. The intent of the DPA is to move California closer to securing the guarantee of inalienable rights, including liberty, privacy, and equality, for all persons as provided by Sections 1 and 7 of Article I of the California Constitution. Ensuring equal protection of the law is also consistent with the intent of Senate Bill 54, described below.

Senate Bill 54 (Chapter 625, Statutes of 2009) amended Section 308 of the Family Code to afford two persons of the same sex who marry outside California the same rights, protections, benefits, responsibilities, obligations, and duties that California law affords to a married man and woman.

On June 16, 2008, the California Supreme court, in *In re Marriage Cases* (2008) 43 Cal.4th 757, legalized same-sex marriage. On November 4, 2008, voters approved Proposition 8, reversing the June 16, 2008 decision, making same-sex marriage illegal in California. Proposition 8 took effect on November 5, 2008. However, the California Supreme Court in *Strauss vs. Horton* (2009) 46 Cal.4th 364 affirmed the validity of same-sex marriages created in this state from June 16, 2008 through November 4, 2008. On February 7, 2012, the [federal] Ninth Circuit Court of Appeals in the case of

Perry vs. Brown (9th Cir. 2013) 725 F.3d 1140, ruled Proposition 8 to be unconstitutional. The case was appealed to the U.S. Supreme Court (*Hollingsworth vs. Perry* (2013) 570 U.S. 12-144). On June 26, 2013, the U.S. Supreme Court ruled that the proponents of Proposition 8 had no right to appeal and therefore upheld the original ruling, finding Proposition 8 to be unconstitutional and same-sex marriage legal in California.

Section 3 of the *Defense of Marriage Act (DOMA)*, which defined “marriage” and “spouse” as excluding same-sex partners, was ruled to be unconstitutional in *United States vs. Windsor* (2013) 570 U.S. 12-307. The U.S. Supreme Court found that section 3 of *DOMA* violated due process and equal protection principles applicable to the federal government.

The principles set forth in these family law statutes and court decisions apply when both partners are alive; thus, the same principles apply under ER processes when one partner dies.

Consistency and Compatibility with Existing State Regulations

The Department has conducted an evaluation of the related existing state regulations in CCR, title 22, Division 3 and has determined that the proposed regulations are consistent and compatible with those regulations.

Anticipated Benefits or Goals of the Regulations

The proposed ER regulations will benefit persons in validly formed partnerships by preventing discrimination and promoting fairness and equality, while creating transparency by requiring the submission of documentation to prove identity and relationship status. Based on current law, the proposed ER regulations authorize deferral of the claim for surviving spouses of both opposite-sex and same-sex marriages, as well as surviving persons of registered domestic partnerships and same-sex legal unions, other than marriage.

Regulatory Sections

This proposed action amends CCR, title 22, sections 50961, 50962 and 50963 to specifically accomplish the following:

1. Specify that ER claims shall not include payments made for certain dual eligible groups pursuant to the MIPPA of 2008.
2. Specify the documentation and submission requirements to substantiate the relationship with the decedent and the identity of a surviving spouse who is seeking an ER claim exemption/deferral.
3. Specify the ER claim process for surviving RDPs and surviving individuals of a same-sex legal union, other than a marriage, including the documentation and submission requirements to substantiate their relationship with the decedent and

their identity as an applicant who is seeking an ER claim deferral based upon a substantial hardship.

4. Update the effective date of the “Application for Hardship Waiver” form, DHCS 6195, previously incorporated by reference, which is used by applicants seeking a substantial hardship waiver, from (8/07) to (5-11).
5. Make non-substantive amendments to achieve clear language, including accurate punctuation and grammar and appropriate designations.
6. Eliminate the current timeframe within which the Department must render a decision regarding a hardship waiver application.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department has made the following initial determinations:

Estimated Fiscal Impact Statement

- A. Costs to any Local Agency or School District that is not reimbursable by the State: None.

Costs to any Local Agency or School District that is required to be reimbursed Under Part 7 (commencing with Section 17500), Division 4 of the Government Code: None.

- B. Costs or Savings to any State Agency: None.

- C. Costs or Savings in Federal Funding to the State: None.

- D. Other Nondiscretionary Costs or Savings Including Revenue Changes Imposed on State or Local Governments: None.

All cost impacts, known to the Department at the time the notice of proposed action was submitted to the Office of Administrative Law, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Mandates on Local Agencies or School Districts

The Department has determined that the proposed regulations would not impose a mandate on local agencies or school districts, nor are there any costs for which reimbursement is required by Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

Significant Statewide Adverse Economic Impact Affecting Businesses

The Department has made an initial determination that the proposed regulations would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

Results of the Economic Impact Assessment (Analysis)

In accordance with Government Code Section 11346.3(b)(1), the Department has made the following assessments and has determined that the proposed regulations would not significantly affect the following:

- (1) The creation or elimination of jobs in California.
- (2) The creation or elimination of businesses in California.
- (3) The expansion of businesses currently doing business in California.

Impact on Jobs and Businesses

Medi-Cal is a public health program that provides health care services for low-income individuals who choose to enroll and participate in the program. This proposed regulatory action supports the ER program, which is a mechanism to control Medi-Cal costs. The ER process includes recoupment of funds from the estates of deceased Medi-Cal beneficiaries or from recipients of the decedent's property. Funds recovered through the ER program are equally distributed between the state and federal government to help subsidize the Medi-Cal program. The proposed regulations affect only those individuals who are subject to the ER process. Therefore, these regulations would have no economic impact to jobs or businesses in the State of California.

Benefits of the Proposed Regulation

The Department has determined that the proposed regulations would not specifically affect worker safety or the state's environment. However, the regulatory proposal will benefit the health and welfare of California residents by supporting the continuation of the Medi-Cal program and the vital health care services that are offered to qualified individuals, which is in part achievable due to California's ER program. This regulatory proposal ensures the proper and efficient administration of the ER program, in accordance with federal and state law. The proposal promotes fairness and equality to all persons, including persons in validly formed partnerships, while creating transparency by requiring, as part of a substantial hardship waiver request, the submission of documentation to prove identification and relationship status.

Effect on Small Businesses

The Department has determined that the proposed regulations would not affect small businesses because small businesses are not required to comply with or enforce the proposed regulations, nor would any benefit or detriment be derived from enforcement.

Housing Costs Determination

The Department has determined that the proposed regulations would have no effect on housing costs.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), the Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Existing ER provisions are found in CCR, title 22, Chapter 2.5, Third Party Liability. Using this regulatory proposal to make amendments to the ER process is the most effective and convenient way to provide current information directly to those impacted by the ER program.

ASSISTIVE SERVICES

For individuals with disabilities, the Department can provide assistive services such as the conversion of written materials into Braille, large print, audiocassette and computer disk. For public hearings, assistive services can include sign-language interpretation, real-time captioning, note takers, reading or writing assistance. To request these assistive services, please call (916) 440-7695 (or California Relay at 711 or 1-800-735-2929), email – regulations@dhcs.ca.gov, or write to the Office of Regulations at the address noted above. Note: The range of assistive services available may be limited if requests are received less than ten business days prior to a public hearing.

The Department shall provide, upon request from a person with a visual disability or other disability for which effective communication is required under state or federal law, a narrative description of the additions to, and deletions from, the California Code of Regulations or other publication in a manner that allows for accurate translation by reading software used by the visually impaired. Providing this description may require extending the period of public comment for the proposed action pursuant to Government Code Section 11346.6.

CONTACT PERSONS

Inquiries regarding the substance of the regulations described in this notice may be directed to: Joy Cheah, Chief, Estate Recovery Section, at (916) 322-8127.

All other inquiries concerning the regulatory action described in this notice may be directed to Lori Manieri, Office of Regulations, at (916) 650-6825, or to the designated backup contact person, Lynette Cordell, at (916) 440-7695.

AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS

The Department has prepared and has available for public review an initial statement of reasons for the proposed regulations, all the information upon which the proposed regulations are based, and the text of the proposed regulations. The Office of Regulations, at the address noted above, will be the location of public records, including reports, documentation, and other material related to the proposed regulations (rulemaking file). In addition, a copy of the final statement of reasons (when prepared) will be available upon request from the Office of Regulations.

The full text of any regulation which is changed or modified from the express terms of this proposed action will be made available by the Department's Office of Regulations at least 15 days prior to the date on which the Department adopts, amends, or repeals the resulting regulation.

Materials regarding the action described in this notice (including this public notice, the regulation text, and the initial statement of reasons) are posted to the Department's Internet site at:

<http://www.dhcs.ca.gov/formsandpubs/laws/Pages/ProposedRegulations.aspx>.

In order to request a copy of this public notice, the regulation text, and the initial statement of reasons be mailed to you, please call (916) 440-7695 (or California Relay at 711 or 1-800-735-2929), email regulations@dhcs.ca.gov, or write to the Office of Regulations at the address noted above.