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September 24, 2020

Re: request for additional explanation for NMDOH amendment to 7.28.2 NMAC

Dear Mr. Erickson:

Pursuant to your request for additional explanation as to the reason 7.28.2 NMAC is being amended, please see the following:

Pursuant to 14-4-5.2 (2) NMAC, NMDOH published in the Register a “short explanation” of the purpose of the proposed rule, which stated, in part:

“This hearing will be conducted to receive public comment regarding the proposed amendment of the current rule which governs public, profit or nonprofit home health agencies providing medically directed therapeutic or supportive services to a patient or client in their place of residence. All facilities licensed as home health agencies, pursuant to Subsection A of Section 24-1-5 NMSA 1978, are subject to all provisions of these regulations.

The hearing will be conducted to receive public comments regarding the proposed amendment of the rule, 7.28.2 NMAC, including the following rule parts:

Amended Subsection A of 7.28.2.33 NMAC-Plan of Care: change to Subsection A and Paragraph (2) and (3) of Subsection A to expand the list of providers who can write and review a plan of care for a patient or client of a home health agency and who will be consulted to approve additions or modifications to the original plan.”

Additional information, beyond the “short explanation” was provided to the public on the NMDOH sunshine portal posting for this rule, which stated in part:

“The purpose of the proposed rulemaking is to make permanent the changes which were incorporated into emergency rule 7.28.2 NMAC which was adopted to bring the New Mexico regulation into compliance with the federal regulatory changes made by the Centers for Medicare and Medicaid Services (CMS), HHS, to certain rules governing home health agencies in response to changes made with the enactment of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (pub. L. 116-136, March 27, 2020).

The proposed rule repeal and replacement of rule 7.28.2 NMAC, and amendment to Section A of 7.28.2.33 NMAC, is in accordance with subsection E of Section 9-7-6 NMSA 1978, Subsection D of section 24-1-2 NMSA, Subsection J of Section 24-1-3, and Section 24-1-5, NMSA 1978, in order to expand the list of practitioners who can order home health services to include physician assistants, nurse practitioners and critical nurse specialists acting within the extent of their licensed scope of practice, which will bring state regulation into compliance with federal law.

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The State Rules Act at NMSA 1978, § 14-4-5.6, has required the Department to adopt a permanent rule to replace emergency rule 7.28.2 NMAC via the normal rulemaking process within 180 days of the emergency rule adoption date of 6/5/2020. A repeal and replacement is necessary because the original rule document is no longer in the database of Records and Archives and must be updated to NMAC 2 in order to incorporate any amendment. “

Additionally, the amendment to bring the existing rule into compliance with the federal regulatory changes is necessary because temporary federal regulatory changes went into effect in March, 2020 with the passage of the CARES ACT in which Congress amended sections 1814 (a) and 1835 (a) of the Social Security Act. According to the CMS explanation provided on its website, the agency has taken the action of making its temporary regulation changes permanent so as to be “consistent with section 3708 of the CARES ACT...we are expanding 42 CFR parts 409, 424.22, 424.507 (b), 440.70, and part 428 to permit nurse practitioners (NPs), clinical nurse specialists (CNSs), and physician assistants (PAs) to certify the need for home health services and order services in the Medicare and Medicaid programs.” The CMS explanation states “the recognition of the advanced training and qualification of these practitioners” has continued with the enactment of the CARES Act. “These changes are to modernize requirements for ordering Medicaid home health nursing, aide and therapy services” states CMS and the “with the expanding authority to order health services, the CARES Act also provides that such practitioners are now capable of independently performing the face-to-face encounter for the patient for whom they are the ordering practitioner, in accordance with state law”. CMS has stated that “these changes are permanent and applicable to services provided on or after March 1, 2020” .

The federal rule revision was effective May 8, 2020. This additional information is available at the following link:

<https://www.federalregister.gov/documents/2020/05/08/2020-09608/medicare-and-medicaid-programs-basic-health-program-and-exchanges-additional-policy-and-regulatory>

Therefore, the rule amendment to 7.28.2.33 NMAC is necessary to have state law incorporate the permanent change announced by CMS to expand the list of practitioners who can order home health services to include physician assistants, nurse practitioners and critical nurse specialists acting within the extent of their licensed scope of practice. The repeal and replacement is necessary because the original rule document is no longer in the database of Records and Archives and must be updated to NMAC 2 in order to incorporate any amendment.

Sincerely,



Ann H. Washburn  
Assistant General Counsel