WSR 23-04-046
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Aging and Long-Term Support Administration)
[Filed January 26, 2023, 11:41 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-08-110.

Title of Rule and Other Identifying Information: This proposal would update chapter 388-76 WAC, Adult family home minimum licensing requirements; amending WAC 388-76-10000 Definitions, 388-76-10030 Adult family home capacity, 388-76-10055 Application—Generally, 388-76-10175 Background checks—Employment—Conditional hire—Pending results of Washington state name and date of birth background check, 388-76-10191 Liability insurance required, 388-76-10192 Liability insurance required—Coverage requirements, 388-76-10780 Toilets and bathing facilities, 388-76-11050 Management agreements—General and 388-76-11055 Management agreements—Adult family home; new WAC 388-76-10004 Exemptions, 388-76-10031 License requirements—Seven or eight bed adult family homes—Licensure, and 388-76-10032 License requirements—Seven or eight bed adult family homes—Change of ownership; and repealing WAC 388-76-10193 Liability insurance required—Professional liability insurance coverage.

Hearing Location(s): On March 21, 2023, at 10:00 a.m., at Office Building 2, Department of Social and Health Services (DSHS) Headquarters, 1115 Washington [Street S.E.], Olympia, WA 98504. Public parking at 11th and Jefferson. A map is available at https://www.dshs.wa.gov/office-of-the-secretary/driving-directions-office-bldg-2; or virtually. Due to the COVID[-19] pandemic, hearings are being held virtually. Please see the DSHS website for the most up-to-date information.

Date of Intended Adoption: Not earlier than March 22, 2023.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, email DSHSRPAURulesCoordinator@dshs.wa.gov, fax 360-664-6185, by March 21, 2023, at 5:00 p.m.

Assistance for Persons with Disabilities: Contact Shelley Tencza, DSHS rules consultant, phone 360-664-6036, fax 360-664-6185, TTY 711 relay service, email Shelley.Tenczsa@dshs.wa.gov, by March 7, 2023, at 5:00 p.m.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This rule making is necessary to incorporate ESHB 1023, 2020 regular session, into the rules. This passed legislation allows certain adult family home providers to increase their capacity from six residents to eight. This rule making is also intended to address challenges that the adult family home industry is facing with complying with the liability insurance requirements in the current rules, and to clarify use, implementation, and enforcement of management agreements. New rules were developed to create a process for adult family home providers to request an exemption to rule. This was requested during the stakeholder meetings.

Reasons Supporting Proposal: This rule making is necessary to incorporate ESHB 1023, 2020 regular session, into the rules. The other sections of rule: (1) Obtaining liability insurance has become increasingly difficult. The proposed language is intended to remove a barrier to the process; (2) the term "management agreement" has been confused with "temporary manager." Clarifying the rule will reduce confusion about these terms and will simplify the requirements by removing the need for department review of management agreements; and (3) developing requirements for exemptions to the adult family home rules will enable some providers to meet the minimum standards in another way. This could help increase the number of adult family home beds.

Statutory Authority for Adoption: RCW 70.128.040.

Statute Being Implemented: RCW 70.128.066.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: DSHS, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Colleen Jensen, P.O. Box 45600, Olympia, WA 98504, 564-999-3182.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Colleen Jensen, P.O. Box 45600, Olympia, WA 98504, phone 564-999-3182, TTY 711, email colleen.jensen1@dshs.wa.gov.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules are adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule; rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect; and rules adopt, amend, or repeal a procedure, practice, or requirement relating to agency hearings; or a filing or related process requirement for applying to an agency for a license or permit.

Explanation of exemptions: The proposed rule requires adult family homes wishing to increase capacity to seven or eight beds complete a capacity increase request application to DSHS. Other parts of the rules correct or clarify language or incorporate by reference.

Scope of exemption for rule proposal:

Is partially exempt:

Explanation of partial exemptions: WAC 388-76-10055 Application—Generally—Adoption of statute without material change; RCW 34.05.310 (4)(c) and (g). WAC 388-76-10175 Background checks—Employment—Conditional hire—Pending results of Washington state name and date of birth background check; language change made for clarity only; RCW 34.05.310 (4)(d). New WAC 388-76-10032 Seven or eight bed adult family homes—Change of ownership, adoption of statute without material change; RCW 34.05.310 (4)(c).

The proposed rule does impose more-than-minor costs on businesses.

Small Business Economic Impact Statement

SUMMARY OF PROPOSED RULES: The DSHS, aging and long-term support administration is proposing amendments to chapter 388-76 WAC, Adult family home (AFH or home) minimum licensing requirements.

This chapter implements chapter 70.128 RCW to promote the safety and well-being of AFH residents, to specify standards for AFH providers, and to further establish requirements for operating an AFH. Specifically, the proposed rules:

- Establish requirements for AFHs to increase capacity for up to eight residents.
- Clarify the definition of "capacity" and address individuals who are not residents but may receive care in the home.
- Include a definition of "household member."
- Correct disparity in liability insurance requirements.
- Address the need for two toilets in homes licensed for five or more residents.
- Distinguish "management agreements" from "temporary manager" and eliminate the need for department approval to enter into management agreements.
- Provide criteria for exemption to the rules of the chapter.

SMALL BUSINESS ECONOMIC IMPACT STATEMENT—DETERMINATION OF NEED: Chapter 19.85 RCW, The Regulatory Fairness Act (RFA), requires that the economic impact of proposed regulations be analyzed in relation to small businesses. The statute defines small businesses as those business entities that employ 50 or fewer people and are independently owned and operated.

The department has analyzed the proposed rule amendments and has determined that small businesses will be impacted by these changes, with some costs considered "more than minor" and disproportionate to small businesses.

INDUSTRY ANALYSIS: The department acknowledges that the majority of AFHs are operated as small businesses.

The department has determined that there are approximately 3,943 AFHs that meet the criteria for small businesses under RCW 19.85.020. These proposed rules impact all of these AFHs.

INVOLVEMENT OF SMALL BUSINESSES: The department held more than 10 stakeholder meetings to ensure appropriate input and feedback were allowed for consideration during the rule-making process. Stakeholders included leadership and representation from the AFH council, provider representation, long-term care ombuds, and the insurance industry. These meetings focused on the requirements of ESHB 1023 passed during the 2020 legislative session and how best to translate those requirements into the least burdensome rules. Homes and their advocacy groups were also given the opportunity to provide input on how the rules may impact costs for their businesses. For cost estimates, the department worked with insurance agents and the AFH council.

COST OF COMPLIANCE: Under RFA, the department has considered annual costs to small businesses that are $50 or more per client served, per affected AFH.

The proposed rules have been evaluated and the department concludes the probable qualitative and quantitative benefits of the proposed rule amendments exceed the probable qualitative and quantitative cost. For liability insurance, homes will be required to add the state as an additional insured, requiring a cost of $150-$200 annually[1]. In addition, as many as 11 percent of homes[2] may incur additional insurance expenses of $2000-$2500 annually[3] should they need to acquire the additional insurance required in these rules. Newly licensed homes licensed for five or more residents will incur costs for the second bathroom needed. The cost could be zero dollars for homes with an existing bathroom and up to more than $10,000 for homes that must add a bathroom. These costs are offset by the anticipated improved resident quality of life, the opportunity for AFH providers to expand license capacity, and the higher level of protection provided by having more comprehensive liability insurance coverage.

GENERAL COSTS:

WAC 388-76-10004 Exemptions.

This proposed rule creates the opportunity for AFH providers to apply for exemptions to requirements under the chapter if they meet the proposed standards and pursuant to departmental approval.

Benefits: The proposed rules add flexibility for AFH providers to meet resident needs based on their abilities and their own circumstances, given requested exemptions do not violate the criteria attached to the proposed rule. The department assumes this will create opportunities to lower costs without decreasing health and safety outcomes for residents and create innovative ideas to meet resident needs in the AFH community.

Costs: The department assumes the costs associated with submitting an exemption request are negligible and related to staff time spent applying for exemptions. However, because exemptions typically reduce cost of compliance for the applicant, the department also assumes there is likely an overall savings associated with this proposed rule.

WAC 388-76-10030 AFH capacity. This rule sets clear parameters around the number of adults who can be cared for under an AFH license with or without special permission.

Benefits: The department assumes the proposed rule helps ensure quality of care for licensed residents by clarifying how the rule should be interpreted, helping prevent citations due to misunderstanding of unclear rule language.

Costs: The department assumes this proposed rule change may result in AFH providers choosing to decrease licensed capacity without discharging current residents. There is a potential for staff time to be used making licensing adjustments for AFH providers who serve nonresident individuals, based on the expected time needed to complete a simple form with readily available information. Printing and postage costs may apply. The department assumes these costs would be less than $50.

WAC 388-76-10031 License requirements—Seven or eight bed adult family homes—Licensure.

This proposed rule allows for an AFH to apply for an increase in licensed capacity under the described conditions and adds a requirement for AFH providers to notify current residents and resident representatives of an application for an increase in licensed capacity.

Benefits: The proposed rule provides existing residents and their representatives ample time to consider the potential effects of a capacity increase and register their concerns with the AFH provider and the department. The department assumes the rule effectively supports residents in expressing concerns with or support of the capacity change and upholds safety standards in the AFH.

The proposed rule will increase the number of AFH beds, which will allow more options for potential residents and will help address the increasing demand for community options. AFHs eligible for expansion are experienced and have demonstrated, over time, the ability to manage an AFH safely and effectively. This provides a level of confidence in the AFHs who are approved to provide care to seven or eight residents.

Costs: This rule will require a minimal amount of staff time to notify residents and resident representatives. The department assumes these costs would be less than $50.

Additional costs for AFH providers who have not received department approval at a higher capacity in the past may be associated with staff time taken to escort an inspector and respond to interview questions. Costs for additional provider staff time to provide care during the inspection or interview questions may apply. The hourly costs[4] are found in the table below, with costs broken out for metropolitan services areas (MSA)[5], nonmetropolitan services areas (NMSA)[6], and King County. The total AFH staff time spent in this process is typically less than one hour, resulting in a range of cost[7] from $14.68 to $16.22 without benefits.

	Without Benefits	With 20% Benefits
King	$16.22	$19.47
MSA	$15.45	$18.54
NMSA	$14.68	$17.61

AFHs with newly constructed or modified bedrooms will need to be inspected by the local building jurisdiction if this has not yet occurred. Costs associated with this inspection vary by jurisdiction. The cost of an inspection for an AFH is not expected to exceed the cost of an inspection for a single-family home not used as an AFH.

WAC 388-76-10191 Liability insurance required. The existing rule allowed certain AFHs to obtain and maintain only general business liability insurance. Under the proposed rules, all AFHs must obtain and maintain general business liability insurance and professional liability insurance. The proposed rule would also set new parameters for the timing of insurance coverage and add a requirement for AFH providers to notify the department should coverage lapse.

Benefits: The proposed rule offers a greater level of protection for both residents and AFH providers should an event occur that would over-tax the resources of the AFH. Potential outcomes could include closure of the AFH due to financial hardship and transfer of residents. The avoided cost of potential closure and resident transfer are significant. The additional protection allows a resident to recoup cost of an injury sustained in the AFH.

The proposed rule removes a barrier to newly licensed AFHs by allowing flexibility to obtain liability insurance prior to admitting their first resident, or within a short time frame when they do not have a resident in their care.

Costs: This proposed rule requires an additional type of insurance for AFHs who were previously not required to have it. This will raise insurance costs for AFHs that were previously not required to have and did not have a medicaid contract requiring professional liability insurance. As many as 89 percent[8] of AFHs should be unaffected by this change based on the number of medicaid-contracted facilities. Insurance costs are highly varied and individualized based on the circumstances of a given AFH. The average range for combined business liability and professional liability coverage starts at $2,000-$2,500 annually[9] on the lower end of the scale based on the level of risk attributed to the individual AFH. Insurance companies assess the risk differently, but could include compliance history and services provided.

WAC 388-76-10192 Liability insurance required—Coverage requirements. The proposed rule adds the state as an additional insured.

Benefits: The department assumes the additional oversight created by adding the state as an additional insured entity and provides an accountability mechanism for AFHs to maintain the appropriate coverage. The proposed rules will increase protections for residents and AFH providers by ensuring that AFHs are not at considerable financial risk due to missing insurance coverage.

Costs: The requirement to add the state as an additional insured will incur a cost. This cost is typically $100-$150[10] plus tax, annually.

WAC 388-76-10780 Toilets and bathing facilities. This proposed rule requires newly licensed AFHs to have at least two toilets available for residents if the AFH is licensed at a capacity of five or more.

Benefits: The department assumes the provision of an additional toilet in AFHs that are licensed for five or more residents will have significant positive impacts on resident hygiene and morale. Meeting the basic needs of residents is essential to their well-being and by adding a toilet, the affected AFHs can reduce waits that could lead to unsanitary situations among residents.

Costs: AFHs seeking a new license for five or more residents may need to add a bathroom, make an existing bathroom accessible, or adjust their licensing application. This requirement affects newly licensed AFHs, excluding existing facilities from the cost of this rule change. For AFHs that already have two bathrooms available to residents, there is no additional cost. For AFHs that need to make amendments to a bathroom to make it available for residents and in compliance with chapter 388-76 WAC and the building code, this may range from small repairs under $50 to repairs costing thousands of dollars. For AFHs that need to add a bathroom to comply with the rule requirement, the department assumes the cost would be $10,000 or more, depending on size, design, labor, and materials.

WAC 388-76-11050 Management agreements—General. This proposed rule changes the timing of when an AFH must notify the department of a new or changed management agreement after initial licensure by submitting an attestation form. In addition, this proposed rule removes the requirement for AFHs to receive departmental approval before entering into a management agreement.

Benefits: The department assumes replacing the required department approval with an attestation form simplifies the management agreement process and saves staff time overall. Staff time taken to seek and receive departmental approval before entering a management agreement will be saved. The department assumes this cost savings would be approximately $50. The proposed rule also creates an avoided cost associated with not being required to wait to enter into a management agreement until after the department has approved the change. This wait period is eliminated by allowing AFH providers to submit an attestation rather than waiting for department approval.

Costs: The department assumes there will be unquantified cost savings as a result of the proposed rules. The cost of completing and submitting the attestation form is offset by the cost savings of removing the requirement for department approval before entering into a management agreement.

Disproportionate Economic Impact Analysis: When proposed rule changes cause more-than-minor costs to small businesses, RFA requires an analysis that compares these costs between small businesses and 10 percent of the largest businesses.

We can assume that the amount of costs does not vary depending on the size of the business. However, because larger businesses are generally able to absorb costs more easily, the impact may be felt more disproportionately by small businesses. Costs associated with acquiring and maintaining liability insurance may impact smaller businesses more than their larger counterparts. The cost of adding a bathroom could be disproportionate for smaller businesses. For example, a $10,000 bathroom expense would be more burdensome to a smaller business than a larger business.

Mitigating Costs: The stakeholder workgroup discussed alternatives to address the challenges of obtaining professional liability insurance. The department considered creating an exemption for currently licensed providers. The risk to providers and residents is high if they do not have professional liability insurance, so the department instead decided to apply the rule change to all providers to limit the number of exemptions.

The workgroup discussed adding a grace period for newly licensed homes to obtain insurance to allow time for the insurance company to process the application after the home has received their license number. Ultimately, the workgroup agreed to the proposal that the home have insurance before admitting their first new resident or within 10 business days, whichever is shorter.

Concerning the need for additional accessible toilets in homes with five or more people using a toilet, the department made this applicable to homes licensed after the effective date of the rule. This will mitigate costs for current licensed AFHs.

While the department cannot directly mitigate disproportionate costs for the smaller businesses, the potential added revenue from increasing license capacity will be proportionally larger for the smaller businesses in the industry. The department assumes this potential added revenue will likely offset the disproportionate costs.

JOBS CREATED OR LOST: The proposed rules do not create or eliminate jobs.

CONCLUSION: The department has given careful consideration to the impact of proposed rules in chapter 388-76 WAC on small businesses. To comply with RFA, the department analyzed impacts on small businesses, proposed ways to mitigate costs considered more than minor and disproportionate, and concluded that the probable benefits of the proposed rules exceed the probable costs.

1 Dana Jeffers - Fortiphi Insurance.

2 DSHS management services division (MSD) AFH locator.

3 Fortiphi Insurance.

4 DSHS MSD, rates/bargained between AFH council and state of Washington as of July 1, 2022.

5 Metropolitan areas include Benton, Clark, Franklin, Island, Kitsap, Pierce, Snohomish, Spokane, Thurston, Whatcom, and Yakima counties.

6 Nonmetropolitan areas include Adams, Asotin, Chelan, Clallam, Columbia, Cowlitz, Douglas, Ferry, Garfield, Grant, Grays Harbor, Jefferson, Kittitas, Klickitat, Lewis, Lincoln, Mason, Okanogan, Pacific, Pend Oreille, San Juan, Skagit, Skamania, Stevens, Wahkiakum, Walla Walla, and Whitman counties.

7 DSHS MSD rates/bargained July 2022.

8 DSHS MSD AFH locator.

9 Fortiphi Insurance.

10 Fortiphi Insurance.

A copy of the statement may be obtained by contacting Colleen Jensen, P.O. Box 45600, Olympia, WA 98504, phone 564-999-3182, email colleen.jensen1@dshs.wa.gov.

January 24, 2023
Katherine I. Vasquez
Rules Coordinator

Reviser's note: The material contained in this filing exceeded the page-count limitations of WAC 1-21-040 for appearance in this issue of the Register. It will appear in the 23-05 issue of the Register.