

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

N.D. Admin. Code Chapter 75-02-02-09.4, General Limitations on Amount, Duration, and Scope (Pages 124 and 125)))))	<u>REPORT OF THE</u> <u>DEPT. OF HUMAN SERVICES</u> December 10, 2009
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For its report, the North Dakota Department of Human Services states:

1. The proposed amendments to N.D. Admin. Code section 75-02-02-09.4 are the result of an appropriation contained in 2009 HB 1012 which allowed an increase in the Medicaid service limits for payment for eye services.
2. These rules are not related to changes in a federal statute or regulation.
3. The Department of Human Services 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 boards, 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 August 11, 2009. The record was held open until 5:00 p.m. on August 24, 2009 to allow written comments to be submitted. None were received. A 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 \$1,923.00.
6. The rules were amended to change the limits on eye services for adults eligible for the North Dakota Medicaid program. The following specific changes were made:
 - Section 75-02-02-09.4. This section is amended to allow one pair of eyeglasses and one refractive eye exam once every two years instead of once each every three years.
7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule 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. A constitutional takings assessment was prepared and is attached to this report.
10. These rules were adopted as emergency (interim final) rules under N.D.C.C. section 28-32-03. The statutory ground for declaring the rules to be an emergency is that they are reasonable necessary to avoid a delay in implementing an appropriations measure. A copy of the Governor's approval of the emergency status of the rules is attached.

Prepared by:

Julie Leer
Legal Advisory Unit
North Dakota Department of Human Services
December 10, 2009

**CHAPTER 75-02-02
MEDICAL SERVICES**

SECTION 1. Section 75-02-02-09.4 is amended as follows:

75-02-02-09.4. General Limitations on Amount, Duration, and Scope.

1. Limitations on payment for occupational therapy, physical therapy, and speech therapy.
 - a. No payment will be made for occupational therapy provided to an individual except for twenty visits per individual per calendar year unless the provider requests and receives prior authorization from the department. This limit applies in combination to services delivered by independent occupational therapists and in outpatient hospital settings. This limit does not apply to school-based services for children.
 - b. No payment will be made for physical therapy provided to an individual except for fifteen visits per individual per calendar year unless the provider requests and receives prior authorization from the department. This limit applies in combination to services delivered by independent physical therapists and in outpatient hospital settings. This limit does not apply to school-based services for children.
 - c. No payment will be made for speech therapy provided to an individual except for thirty visits per individual per calendar year unless the provider requests and receives prior authorization from the department. This limit applies in combination to services delivered by independent speech therapists and in outpatient hospital settings. This limit does not apply to school-based services for children.
2. Limitation on payment for eye services.
 - a. No payment will be made for eyeglasses for individuals twenty-one years of age and older except for one pair of eyeglasses no more often than once every ~~three~~ two years. No payment will be made for the repair or replacement of eyeglasses during the ~~three-year~~ two-year period unless the provider has secured the prior approval of the department and the department has found that the repair or replacement is medically necessary.
 - b. No payment will be made for refractive examinations for individuals twenty-one years of age and older except for one refractive examination no more often than every ~~three~~ two years after an initial examination paid by the department unless the provider has secured the prior approval of the department.
3. Limitation on chiropractic services.
 - a. No payment will be made for spinal manipulation treatment services except for twelve spinal manipulation treatment services per individual per calendar year unless the provider requests and receives the prior approval of the department.
 - b. No payment will be made for radiologic examinations performed by a chiropractor except for two radiologic examinations per individual per year

unless the provider requests and receives the prior approval of the department.

4. No payment will be made for psychological visits except for forty visits per individual per calendar year unless the provider requests and receives the prior approval of the department.

History: Effective September 1, 2003; amended effective July 1, 2006; July 1, 2009.

General Authority: NDCC 50-24.1-04

Law Implemented: NDCC 50-24.1-04



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John Hoeven, Governor
Carol K. Olson, Executive Director

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED AMENDMENTS TO N.D. ADMIN. CODE SECTION 75-02-02-09.4 LIMITATIONS ON PAYMENT FOR EYE SERVICES

The North Dakota Department of Human Services (the Department) held a public hearing on August 11, 2009, in Bismarck, ND, concerning a proposed amendment to N.D. Administrative Code Chapter 75-02-02-09.4, Limitations on Payment for Eye Services.

Written comments on these proposed amendments could be offered through 5:00 p.m. on August 24, 2009.

Two individuals attended the public hearing. No written comments were received within the comment period. The commentators were:

1. Nancy J. Kopp, Executive Director, North Dakota Optometric Association, 921 South 9th Street, Suite 120, Bismarck, ND 58504
2. Danelle Moch, optometrist, 1221 West Divide Avenue, Suite 1, Bismarck, ND 58501

SUMMARY OF COMMENTS

Comment: Nancy J. Kopp expressed support for the revisions to 75-02-02-09.4 and submitted written comments on behalf of the North Dakota Optometric Association members who provide optometric and medical eye care services to Medicaid recipients.

Response: No response required.

Comment: Danelle Moch expressed gratitude on behalf of several local optometrists for the revisions to 75-02-02-09.4. She stated she has already seen several patients under the new two year guideline and the patients have been very appreciative as well.

Response: No response required.

There will be no change to the proposed amendment based on the comments received.

Prepared by:

A handwritten signature in cursive script that reads "Julie Leer".

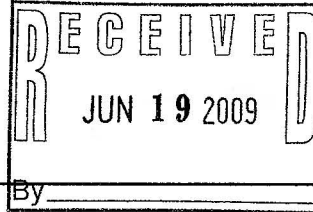
Julie Leer, Director
Legal Advisory Unit
N.D. Dept. of Human Services

August 31, 2009

Cc: Maggie Anderson, Medical Services



John Hoeven, Governor
Carol K. Olson, Executive Director



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MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director, Medical Services Division *[Signature]*

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

DATE: June 18, 2009

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed 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 change the limits on eye services for adults eligible for the North Dakota Medicaid program. The current limit is one pair of eyeglasses every three years and one refractive eye exam every three years. The new limit would be once every two years for both the exam and the eye glasses.

The North Dakota Medicaid program implemented a variety of service limits after the 2003 Legislative session. The optometric limits were among these. During the 2007-2008 Interim, the North Dakota Optometric Association presented information to the Department on the Optometric Practice Guidelines (from the American Optometric Association). The Medicaid service limits conflict with the Optometric Practice Guidelines for eye care. Recognizing the importance of proper eye care, the Executive Budget contained the funding to reduce the eye exam and eye glasses limit from once every three years to once every two years.

Classes of Persons Who Will be Affected

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

Adults who qualify for Medicaid will be positively impacted, in that they can receive eye exams and eye glasses once every two years, rather than once every three years. Optometric providers will be positively impacted as they can practice under the

Optometric Practice Guidelines and they will be able to reduce their effort in seeking authorization for clients to receive services outside of the limits.

Probable Impact

The 2009-2011 fiscal impact of making the proposed changes is \$128,987, of which \$47,531 are general funds.

Probable Cost of Implementation

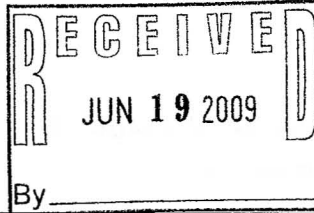
Additional general funds of \$47,531 will be needed for the implementation of the change in the limits for 2009-2011. It is expected that there would be no impact on state revenues.

Consideration of Alternative Methods

No other methods were considered, as the rule is very straight forward and needs to be changed from every three years to every two years.



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John Hoeven, Governor
Carol K. Olson, Executive Director

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director, Medical Services Division *Maggie*

DATE: June 18, 2009

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed [New/ Amendments to] N.D. Admin. Code chapter 75-02-02

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 [new/amendments to] N.D. Admin. Code chapter 75-02-02. The proposed rules are not mandated by federal law.

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

There will be no reporting requirements for small entities.

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

There will be no reporting requirements for small entities.

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

There will be no reporting requirements for small entities.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

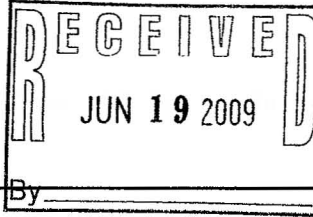
There are no performance standards for small entities that will result from the implementation of these rules.

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

There are no requirements for small entities in the proposed rules.



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John Hoeven, Governor
Carol K. Olson, Executive Director

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director, Medical Services Division *Maggie*

DATE: June 18, 2009

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

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. Admin. Code chapter 75-02-02. The proposed rules are not mandated by federal law. The proposed rules are not expected to have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the rules are small optometric service providers.

2. Costs For Compliance

There are no expected administrative and other costs required for compliance with the proposed rule.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule is none.

The probable benefit to private persons and consumers who are affected by the proposed rule are: Consumers will be allowed to receive optometric eye exams and eye glasses once every two years rather than once every three years. Providers will see a reduction in the paperwork needed to request an exception to the three year limit.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: none.

5. Alternative Methods

The Department did not consider alternative methods, as this is the most efficient means to change the limit and allow the eye exams and eye glasses on a more frequent basis.

John Hoeven, Governor
Carol K. Olson, Executive Director

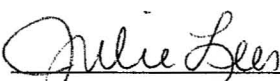
TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code section 75-02-02-09.4.

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.

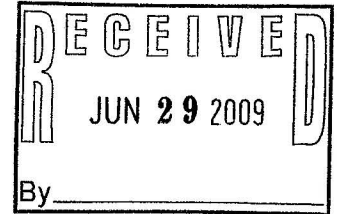
Dated this 18th day of June, 2009.

by: 
N.D. Dept. of Human Services



— State of —
North Dakota
Office of the Governor

John Hoeven
Governor



June 29, 2009

Carol Olson
Executive Director
Department of Human Services
600 East Boulevard Avenue
Bismarck, ND 58505-0250

Dear Carol,

On June 26, 2009, I received your request for approval of emergency rulemaking to increase reimbursement under Medicaid for eye services.

I have reviewed the request pursuant to N.D.C.C. § 28-32-03(2) and find that emergency rulemaking is necessary to implement the additional appropriations in House Bill 1012 to increase reimbursement rates for eye services effective July 1, 2009.

Sincerely,

A handwritten signature in black ink, appearing to be "John Hoeven".

John Hoeven
Governor

38:34:58