Common Sense Initiative

Mike DeWine, *Governor*
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Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Medicaid

Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

5 YR Hospice Rules

Rule Number(s): 5160-56-02 (amend), 5160-56-03 (amend), 5160-56-03.3 (amend), 5160-56-04 (amend), and 5160-56-06 (amend). Rules 5160-56-01 (amend) and 5160-56-05 (amend) – are included for informational purposes only.

Date of Submission for CSI Review: 06/21/24

Public Comment Period End Date: 06/28/24

Rule Type/Number of Rules:

New/___ rules
No Change/____ rules (FYR? ___)
Amended/_7__ rules (FYR? 7)
Rescinded/____ rules (FYR? ___)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Reason for Submission

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

   Which adverse impact(s) to businesses has the agency determined the rule(s) create?

   The rule(s):

   a. ☒ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**

   b. ☐ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**

   c. ☒ **Requires specific expenditures or the report of information as a condition of compliance.**

   d. ☐ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

2. **Please briefly describe the draft regulation in plain language.**
   Please include the key provisions of the regulation as well as any proposed amendments.

   5160-56-02 (amend) Hospice services: eligibility and election requirements.

   This rule sets forth the provisions for the criteria that must be met for an individual to receive the Ohio Medicaid hospice benefit. The planned changes to the rule are:

   - Language in the opening paragraph is being deleted because it is not necessary.
   - Language in paragraph (A)(4) is being deleted because it is not necessary.
   - Paragraphs are being re-lettered as necessary.
   - In new paragraph (E), managed care language is being updated to align with rule 5160-26-01 of the Administrative Code.
   - In new paragraph (H)(3), outdated language is being removed.
   - In new paragraph (K), references to paragraphs of rule 5160-56-03 of the Administrative Code are being updated.
   - Dates for various publications are being updated throughout the rule.
   - Regulatory restrictions are being removed throughout the rule pursuant to section 121.95 of the Revised Code.

5160-56-03 (amend) Hospice services: discharge requirements.

This rule sets forth the provisions for the circumstances and/or process whereby a hospice would discharge, transfer, or revoke an individual from Ohio Medicaid hospice. The planned changes to the rule are:

- Certain phrasing is being modified in the rule for purposes of clarity.
- In paragraph (A)(2), language is being replaced to reflect the new manner in which hospice enrollment data is reported to ODM, through a Medicaid provider portal, and to remove all references to the Medicaid Information Technology System (MITS).
- Regulatory restrictions are being removed throughout the rule pursuant to section 121.95 of the Revised Code.
- Paragraphs are being re-lettered as necessary.
- Certain language is being deleted because it is not necessary.

5160-56-03.3 (amend) Hospice services: reporting requirements.

This rule sets forth the provisions for the requirements for reporting hospice enrollment data to the Department, through the provider web portal, for individuals receiving Medicaid hospice care in accordance with Chapter 5160-56 of the Administrative Code, including individuals who may be covered by third-party insurance, such as Medicare, for which the hospice seeks reimbursement. The planned changes to the rule are:

- In paragraph (A), language is being replaced to reflect the new manner in which hospice enrollment data is reported to ODM, through a Medicaid provider portal, and to remove all references to the Medicaid Information Technology System (MITS).
- In paragraph (A)(2), language is being updated to include all procedure codes for all hospice services.
- In paragraph (A)(2)(a), outdated language is being removed.
- In paragraph (B), language is being replaced to reflect the new manner in which hospice enrollment data is reported to ODM, through a Medicaid provider portal, and to remove all references to the Medicaid Information Technology System (MITS).
- In paragraph (B)(8)(b), language is being replaced to reflect the new manner in which hospice enrollment data is reported to ODM, through a Medicaid provider portal, and to remove all references to the Medicaid Information Technology System (MITS).
- In paragraph (B)(11), language is being updated to clarify where supporting documentation should be submitted.

- In paragraph (C), language is being replaced to reflect the new manner in which hospice enrollment data is reported to ODM, through a Medicaid provider portal, and to remove all references to the Medicaid Information Technology System (MITS).
- Regulatory restrictions are being removed throughout the rule pursuant to section 121.95 of the Revised Code.

5160-56-04 (amend) Hospice services: provider requirements.

This rule sets forth the provisions for the responsibilities of a hospice to be eligible to provide and to request reimbursement for hospice services. The planned changes to the rule are:

- Language in old paragraph (A) is being deleted because it is not necessary.
- Language in old paragraph (D) is being deleted because it is not necessary.
- Certain language is being deleted because it is not necessary.
- Paragraphs are being re-lettered as necessary.
- Dates for various publications are being updated throughout the rule.
- Regulatory restrictions are being removed throughout the rule pursuant to section 121.95 of the Revised Code.

5160-56-06 (amend) Hospice services: reimbursement.

This rule sets forth the provisions for the Ohio Department of Medicaid payment for hospice services and care. The planned changes to the rule are:

- Dates for various publications are being updated throughout the rule.
- Certain language is being deleted because it is not necessary.
- Regulatory restrictions are being removed throughout the rule pursuant to section 121.95 of the Revised Code.
- In paragraph (B)(3), language is being added to account for the ending of the two-percentage points payment reduction penalty at the close of federal fiscal year 2024 for non-compliant hospice providers.
- In new paragraph (B)(4), language is being added to account for the change of the payment reduction penalty to four-percentage points beginning with federal fiscal year 2025 for non-compliant hospice providers.
- In paragraph (C), language is being removed that allows telehealth services to be provided when in-person visits are required, to align with federal flexibilities that ended with the public health emergency.
- In paragraph (C)(1)(a), the citation is obsolete and is being removed.

- In paragraph (C)(5), language is being removed which references billing for routine home care services and continuous home care services delivered through telehealth, to align with federal flexibilities that ended with the public health emergency.
- In paragraph (C)(6), language is being removed that is no longer relevant due to federal flexibilities that ended with the public health emergency.
- In paragraph (D), language is being added to clarify that the reimbursement for room and board will be based on ninety-five percent of the rate that the long-term care facility would have otherwise received if the individual was not enrolled in hospice.
- In paragraph (D)(3), clarification is being added to identify when a hospice can bill for room and board when an individual is in a NF or ICF-IID.
- In paragraph (D)(5), language is being removed that references room and board services delivered through telehealth, to align with federal flexibilities that ended with the public health emergency.

3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

5160-56-02
Statutory Authority: 5164.02
Amplifies: 5162.03

5160-56-03
Statutory Authority: 5164.02
Amplifies: 5162.03

5160-56-03.3
Statutory Authority: 5164.02
Amplifies: 5162.03

5160-56-04
Statutory Authority: 5164.02
Amplifies: 5162.02

5160-56-06
Statutory Authority: 5164.02
Amplifies: 5162.03

4. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

5160-56-02

Yes. To be eligible for Medicaid Hospice, all individuals and providers must meet federal eligibility requirements as prescribed in Section 1861(dd) of the Social Security Act and 42 C.F.R. Part 418. The Act specifies services covered under hospice care and the conditions which a hospice program must meet in order to participate in the state's administered and/or supervised hospice program and serves as the basis for OAC rule 5160-56-02.

5160-56-03

42 C.F.R. Part 418.200 amplifies section 1861(dd) of the Social Security Act and serves as the basis for OAC rules 5160-56-03, 5160-56-03.3, and 5160-56-04 which detail hospice related discharge, reporting, and provider eligibility requirements.

5160-56-03.3

42 C.F.R. Part 418.200 amplifies section 1861(dd) of the Social Security Act and serves as the basis for OAC rules 5160-56-03, 5160-56-03.3, and 5160-56-04 which detail hospice related discharge, reporting, and provider eligibility requirements. 42 C.F.R. §418.310 requires hospice providers to complete reports and keep records as the Secretary determines necessary to administer the program.

5160-56-04

This rule requires all individuals and hospice providers to meet federal eligibility requirements as prescribed in Section 1861(dd) of the Social Security Act and 42 C.F.R. Part 418. The Act specifies services covered under hospice care and the conditions which a hospice program must meet in order to participate in the state's administered and/or supervised hospice program. 42 C.F.R. Part 418 amplifies section 1861(dd) of the Social Security Act and serves as the basis for OAC rules 5160-56-04, 5160-56-05, and 5160-56-06 which detail hospice provider eligibility requirements.

5160-56-06

In rule 5160-56-06, hospice providers are required to comply with federal requirements found in 42 C.F.R. 418.312 (as in effect October 1, 2023) which specifies the data submission requirements under the hospice quality reporting program for hospice providers.

5. **If the regulation implements a federal requirement, but includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

5160-56-02

The regulations amplify hospice provisions in the C.F.R. and do not extend beyond these federally imposed requirements.

5160-56-03

The Department of Medicaid believes the provisions in this rule that exceed federal requirements are necessary to ensure compliance with numerous regulations in the Administrative Code related to the delivery of hospice covered services to individuals in a NF or ICF-IID and individuals enrolled in a home and community-based services waiver program.

5160-56-03.3

The Department of Medicaid believes the provisions in this rule that exceed federal requirements are necessary to ensure compliance with numerous regulations in the Administrative Code related to the reimbursement of hospice covered services, including individuals residing in a NF or ICF-IID.

5160-56-04

The regulations amplify hospice provisions in the C.F.R. and do not extend beyond these federally imposed requirements.

5160-56-06

The Department of Medicaid believes the provisions in this rule that exceed federal requirements are necessary to ensure compliance with numerous regulations in the Administrative Code related to the reimbursement of hospice covered services, including individuals residing in a NF or ICF-IID.

6. **What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The public purposes for these regulations are to comply with federally imposed, regulatory standards that govern the Medicaid hospice benefit in Ohio and express the rate in which hospices are reimbursed for the provision of services in Ohio. ORC section 5164.02 requires the inclusion of the payment methodology for hospice services in OAC. The standards are congruent with federal policy for Medicare and Medicaid hospice and purposed to ensure

that such standards are uniformly established and enforced across Ohio. The regulations establish the minimal conditions whereby certified providers shall participate in hospice.

7. **How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

   The success of the regulations will be determined by ongoing communication with providers and stakeholders.

8. **Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**
   If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

   None of the proposed rules are being submitted pursuant to these specified sections of the Revised Code.

Development of the Regulation

9. **Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**
   If applicable, please include the date and medium by which the stakeholders were initially contacted.

   The hospice provider associations in Ohio are:

   - Leading Age Ohio
   - Ohio Council for Home Care & Hospice
   - Ohio's Hospice
   - Ohio Department of Developmental Disabilities
   - Ohio Department on Aging
   - Ohio Health Care Association

   The hospice provider associations were involved in review of the draft rules when the Department of Medicaid emailed the draft rules and a summary of the rule changes to the associations on April 11, 2023.

10. **What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

Based on feedback from the Ohio Health Care Association (OHCA), two changes were made to the rules: references to fiscal year in rules 5160-56-01 and 5160-56-06 will now be identified as federal fiscal year and ODM modified the updated language in 5160-56-03.3 and removed the word application. OHCA requested an increase in hospice room and board reimbursement from 95% to 100% of the nursing facility per diem rate for individuals receiving hospice care in a nursing facility. ODM acknowledged this feedback but did not make changes to the rule.

11. **What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

    Scientific data was not applicable to the development of these rules.

12. **What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?** ***Alternative regulations may include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.***

    No alternative regulations were considered by the Agency as the requirements of these rules are dictated by federal law.

13. **What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

    The Department of Medicaid's staff reviewed related hospice regulations in ORC and OAC to ensure these rules are not duplicative.

14. **Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

    The final rules as adopted by the Department of Medicaid will be made available to stakeholders and the general public on the Register of Ohio website.

Adverse Impact to Business

15. **Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:**
    a. **Identify the scope of the impacted business community, and**

       These rules impact approximately 162 hospice providers in Ohio that choose to participate in the Medicaid program.

b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).
The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a representative business. Please include the source for your information/estimated impact.

Compliance with Medicaid program requirements is mandatory for providers who choose to participate in the program and may result in administrative costs as detailed below.

5160-56-02

Pursuant to this rule, hospice providers are required to ensure that certain criteria are met prior to furnishing hospice care in accordance with applicable federal and state law. The designated hospice must provide the individual under hospice care with a copy of the hospice agency's grievance procedures, and information pertaining to advance directives. Hospice providers must submit a hospice election form to ODM through the provider web portal. The estimated cost for a hospice provider to submit a hospice election form through the provider web portal and provide hospice individuals with copies of grievance procedures and information on advance directives is approximately $51. Either an RN or MSW would take 1.5 hours at an average rate of $34/hour plus copying the Advance Directive forms (20 pages at $0.10/page). SOURCE: The Ohio Council on Home Care and Hospice; Hospice Salary & Benefit Report, 2021-2022, Hospital & Healthcare Compensation Service.

5160-56-03

The designated hospice should notify the Department of Medicaid of an individual's discharge from hospice, through the provider web portal, which is a report of information. The hospice provider must provide the individual with a copy of the written revocation statement.

5160-56-03.3

In accordance with provisions in this rule, hospice providers should report necessary hospice enrollment information for each individual enrolled in Medicaid fee-for-service hospice, to the Department of Medicaid through the provider web portal. The estimated cost of entering information and uploading documents into the provider web portal is approximately $22. Depending on how many pages of information, it may take up to one hour at $22/hour per enrollment/per benefit period. The hospice agencies would need to enroll each individual into the provider web portal. SOURCE: The Ohio Council on

Home Care and Hospice; Hospice Salary & Benefit Report, 2021-2022, Hospital & Healthcare Compensation Service.

5160-56-04

The initial and renewal application fee for hospice licensure is $600 per provider. The Medicaid application fee of $631 is waived for licensed hospices that are Medicare certified, which is required by ODM pursuant to 5160-1-17.8 of the Administrative Code. The hospice provider must be licensed, and Medicare certified by the Ohio Department of Health (or accrediting organization) in order to be a Medicaid hospice provider, as licensure and Medicare certification are requirements for all hospice providers in Ohio regardless of whether they serve Medicaid or non-Medicaid individuals. See rule 3701-19-02 of the Administrative Code. The three years' renewal for ODH licensure cost is $600 every three years, and at least every 36 months ODH (or an accrediting organization) completes a Medicare recertification survey at a cost of $1,625.

5160-56-06

In accordance with paragraph (B)(3) of this rule, for designated hospices that fail to comply with the hospice quality reporting program as federally mandated for fiscal years 2014 through 2024, ODM will reimburse the payment amount minus a two-percentage point reduction for the corresponding federal fiscal year.

In accordance with (B)(4) of this rule, for designated hospices that fail to comply with the hospice quality reporting program as federally mandated, beginning with federal fiscal year 2025 and subsequent fiscal years, the reduction increases to 4 percentage points. Any reduction of the percentage change will apply only to the fiscal year involved and will not be taken into account in computing the payment amounts for a subsequent fiscal year.

16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. *(Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors).*

There are no proposed changes to the rules that will reduce a regulatory burden imposed on the business community.

17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

Hospice regulations are required by federal statute and as such, are required for Medicaid to reimburse for hospice services.

Regulatory Flexibility

18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No. The provisions in these rules are the same for all hospice providers and are based on federal law.

19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

ORC section 119.14 is not applicable to these rules as these rules do not impose any fines or penalties for paperwork violations as defined in ORC section 119.14.

20. What resources are available to assist small businesses with compliance of the regulation?

Providers in need of assistance may contact the Bureau of Long-Term Care Services and Supports, through the Provider Relations Hotline at (800) 686-1516.