RULE-MAKING ORDER

CR-103E (July 2011)
(Implements RCW 34.05.350)

Agency: Department of Social and Health Services, Aging and Long-Term Support Administration

Emergency Rule Only

Effective date of rule:
Emergency Rules
☐ Immediately upon filing.
☒ Later (specify) January 6, 2017

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?
☐ Yes ☒ No If Yes, explain:

Purpose:

The department is adding two new sections to chapter 388-71 WAC "Home and Community Services and Programs", amending one section in chapter 388-106 WAC "Long-Term Care Services", and creating a new chapter as chapter 388-114 WAC "Travel Time and Work Week Limitations for Individual Providers", as a result of the passage of E2SHB 1725.

Citation of existing rules affected by this order:
Repealed: None
Amended: WAC 388-106-1458
Suspended: None

Statutory authority for adoption: RCW 74.08.090, RCW 74.09.520

Other authority: E2SHB 1725

EMERGENCY RULE

Under RCW 34.05.350 the agency for good cause finds:

☒ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

☐ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

☐ That in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal year 2009, 2010, 2011, 2012, or 2013, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this finding: The department is clarifying that the department may approve a work week limit in excess of eighty service hours per week in exceptional circumstances and made a minor correction in WAC 388-114-0040. This CR-103E filing supersedes WSR 16-18-091 filed on September 7, 2016. The rules hearing was held November 22, 2016, and the department intends to file the permanent order as soon as possible.

Date adopted:
December 29, 2016

NAME (TYPE OR PRINT)
Katherine Vasquez

SIGNATURE

TITLE
DSHS Rules Coordinator

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: January 05, 2017
TIME: 11:05 AM

WSR 17-03-013

(COMPLETE REVERSE SIDE)

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	15	Amended	1	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____

The number of sections adopted in the agency's own initiative:

New	_____	Amended	_____	Repealed	_____

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	_____	Repealed	_____

The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	15	Amended	1	Repealed	_____

NEW SECTION

WAC 388-71-0507 What responsibilities do clients have related to individual provider work week limits? Clients must comply with WAC 388-114-0090.

NEW SECTION

WAC 388-71-0518 What responsibilities do individual providers have related to work week limitation? Individual providers must comply with WAC 388-114-0100.

AMENDATORY SECTION (Amending WSR 13-18-039 and 13-17-125, filed 8/29/13 and 8/21/13, effective 10/1/13)

WAC 388-106-1458 How do I create and use my spending plan? (1) You create your spending plan with the assistance of the care consultant using the new freedom self-assessment and the CARE assessment.

(2) The spending plan must be approved by both you and the care consultant.

(3) You and your care consultant must identify how many personal care service units you intend to purchase prior to the month you plan to use them (service month).

(4) The value of those units is deducted from your new freedom budget.

(5) The rest of the funds can be used for other covered goods and services or saved.

((~~(a)~~)) (6) Once a service month begins, the number of personal care units may not be altered during that month.

((~~(b)~~)) (7) The maximum number of personal care units that can be purchased from the monthly budget is calculated from the individual budget as described in WAC 388-106-1445, divided by the individual provider average wage including mileage.

((~~(c)~~)) (8) Prior to the service month, you may elect to use savings funds to buy additional personal care.

((~~(d)~~)) (9) You ((~~can~~)) may choose to have your personal care provided by an individual provider (IP) or a home care agency.

(10) Each unit will be deducted from your new freedom budget at the average IP wage rate including mileage.

((~~(e)~~)) (11) The balance of your individual new freedom budget will be available in your NFSP to save or purchase other goods and services up to the limit described in WAC 388-106-1455(2).

((~~(f)~~)) (12) If you have a change of condition or situation and your new freedom budget increases due to a new assessment or exception to rule, you may purchase additional personal care from an IP or home care agency mid-month at the average IP rate, including mileage during the month your budget changed.

((~~(g)~~)) (13) You may assign your predetermined personal care units to a different provider during the month of service.

(14) Under chapter 388-114 WAC, individual providers for one or more department clients who work more than forty hours in a work week, are entitled to overtime and the responsibility for paying the extra cost as follows:

(a) If the department approves the individual provider to work more than forty hours per week as described in WAC 388-114-0080, the department will pay the extra cost for overtime up to the number of service hours the individual provider is approved to work and the payment for these extra costs will not be charged to your budget; and

(b) If you assign more overtime hours to your individual provider than the department approved, you must pay the extra costs for the unapproved overtime hours and the additional cost will impact your monthly budget and may reduce the number of service hours you are able to purchase from it.

Chapter 388-114 WAC
TRAVEL TIME AND WORK WEEK LIMITATIONS FOR INDIVIDUAL PROVIDERS

NEW SECTION

WAC 388-114-0010 What is the purpose of this chapter? The purpose of this chapter is to describe:

(1) The number of hours the department may approve an individual provider to work in a work week;

(2) How the department determines work week limitations;

(3) When the department may approve an individual provider to work more than the work week limit;

(4) Client responsibilities regarding work week limits;

(5) Individual provider responsibilities around work week limits;

(6) What happens when a family or household member works more hours than are authorized in the client's plan of care;

(7) What happens when an individual provider works more than the work week limit or submits claims for unauthorized travel time;

(8) How the department approves and authorizes travel time; and

(9) Travel time limitations.

NEW SECTION

WAC 388-114-0020 What definitions apply to this chapter? The following definitions apply to chapter 388-114 WAC:

"Approve" means the department, either in advance or after the fact, has reviewed the circumstances, applied the rules in this chapter, and has authorized the individual provider to work more than forty hours in a work week.

"Family member" includes, but is not limited to a parent, child, sibling, aunt, uncle, niece, nephew, cousin, grandparent, grandchild, grandniece, grandnephew, or such relatives when related by marriage.

"Household member" means the individual provider lives with the client and has a relationship with the client that existed before the client was assessed and approved for department paid personal care services as defined in WAC 388-106-0010.

"Overtime" means the number of hours an individual provider works in a work week that is more than forty hours. When required by law, the overtime wage is one and one half times the individual provider's regular wage rate. Paid time off does not accrue as overtime pay.

"Service hours" means the time individual providers are paid by the department to provide personal care, relief care, skills acquisition training, or respite services under medicaid state plan and 1915(c) waiver programs, roads to community living, the veterans directed home services program, and programs solely funded by the state. Service hours do not include hours paid for training, travel, or paid time off.

"Travel time" means the direct one way travel time from one worksite to another in the same workday. Direct one way travel is the amount of time it takes to travel the most direct route between two specific worksites on the same day, as verified by using an online mapping tool.

"Worksite" means the location where an individual provider provides authorized care to a department client or attends required training. An individual provider's residence is not a worksite for the purposes of travel time, whether or not the client lives there.

"**Work week**" begins at 12:00 a.m. Sunday morning and ends at 11:59 p.m. the following Saturday night.

"Work week limit" means the total number of service hours an individual provider may provide in a work week. Travel time and required IP training time hours are not included in the work week limit.

NEW SECTION

WAC 388-114-0030 How does the department determine an individual provider's work week limit? (1) An individual provider's work week limit is forty service hours per week, unless the department approves a higher work week limit as described in this chapter.

(2) Subject to any expenditure limitations required by RCW 74.39A.270(10), if the department paid the individual provider for one hundred and seventy-four or more service hours of work performed in January 2016, the individual provider's work week is calculated by dividing the individual provider's January paid service hours by 4.33 and rounding to the nearest quarter hour.

(3) An individual provider's maximum work week limit cannot exceed sixty-five hours regardless of the number of service hours the individual provider worked in January 2016 and beginning July 1, 2017, the maximum work week limit cannot exceed sixty service hours.

NEW SECTION

WAC 388-114-0040 How many hours may the department approve an individual provider to work in a work week? Subject to the expenditure limitations of RCW 74.39A.270(10), the department may approve an individual provider to work more than a total of forty hours in a work week for one or more of the following reasons:

(1) The individual provider has a higher work week limit as described under WAC 388-114-0030(2);

(2) The individual provider has a higher work week limit because the department determined that the additional hours are necessary for the client for one of the reasons listed in WAC 388-114-0080;

(3) It is allowable travel time as described in WAC 388-114-0130 and WAC 388-114-0140;

(4) The individual provider attends required training during the work week.

NEW SECTION

WAC 388-114-0050 What if the service hours the individual provider was paid for in January 2016 does not accurately represent the individual provider's work history in February and March 2016? If the individual provider's service hours paid in January 2016 do not accurately represent the individual provider's work history for the first three months of 2016:

(1) The individual provider may appeal the determination by submitting a request to the client's case manager to review the work week limit calculated under WAC 388-114-0030, but the IP is not entitled to an administrative hearing under chapter 34.05 RCW.

(2) The department will review the work week limit if:

(a) The individual provider was contracted with the department;

(b) The individual provider was employed by a client in January 2016; and

(c) The total monthly service hours the individual provider was paid in January 2016 is less than the total monthly service hours the individual provider was paid in either February or March 2016 and the average in those months was above forty hours.

(3) The department will not review the work week limit of an individual provider who was not contracted with the department or was not employed by a client in January 2016.

(4) The department will evaluate individual provider service hours appeals for review as follows:

(a) Calculate the individual provider's average number of weekly service hours paid in January 2016 by dividing the total January service hours paid by 4.33 which is the average number of weeks in a month;

(b) Calculate the average number of weekly service hours the individual provider was paid for February and March 2016 as follows:

(i) The average weekly service hours for February equals the total monthly service hours divided by 4.33 which is the average number of weeks in a month;

(ii) The average weekly service hours for March equals the total monthly service hours divided by 4.33 which is the average number of weeks in a month; and

(iii) Add the average weekly service hours for February and March 2016 together and divide the total by two to get the average weekly service hours for February and March; and

(c) If the average weekly service hours for January 2016 is less than the average weekly service hours for February and March 2016, the department will use the average weekly service hours for February and March 2016 as the individual provider's weekly service hour limit.

NEW SECTION

WAC 388-114-0070 May an individual provider work more than his or her work week limit? An individual provider with a work week limit of:

(1) Forty service hours per week may only exceed the work week limit as described in WAC 388-114-0080;

(2) More than forty service hours has flexibility to work more than his or her work week limit in a given week if:

(a) Requested by the client to meet a specific need;

(b) Doing so would not exceed the client's monthly authorized hours;

(c) The total number of service hours worked over forty for each work week in a calendar month does not exceed the amount of overtime the individual provider would receive if he or she worked his or her work week limit every week of the calendar month; and

(d) The use of more service hours in a given week will not result in a client going without essential care in other weeks of the month.

NEW SECTION

WAC 388-114-0080 When may the department temporarily increase an individual provider's work week limit allowed in WAC 388-114-0040? (1) In addition to the increased work week limit allowed under WAC 388-114-0040, the department may temporarily increase an individual provider's work week limit if it determines the increase is necessary:

(a) Due to lack of available providers who are able to adequately meet a client's care needs, as evaluated by the department in its consideration of:

(i) The overall availability of providers in the geographic region;

(ii) Whether the client has complex medical or behavioral needs;

(iii) Whether the client requires a provider with specific language skills; and

(iv) The client's good faith efforts and cooperation to manage his or her service hours and locate and select additional providers, which must include:

(A) Making schedule adjustments within the work week limits of current providers who are providing your services;

(B) Seeking a qualified family or friend to contract as an individual provider;

(C) Utilizing the home care referral registry; and

(D) Requesting a worker through a home care agency, unless doing so would cost more than paying the individual provider overtime;

(b) To protect a client's health and safety, as evaluated by the department in its consideration of:

(i) Whether the request is to approve service hours the individual provider spent caring for the client because of an emergent condition;

(ii) The nature and severity of the emergent condition; and

(iii) Whether the need could have been postponed until another provider could have arrived; or

(c) To prevent an increased risk that the client will be unable to remain in a home or community based setting, except in cases where there are additional qualified providers available to select and the client has chosen not to select them.

(2) When an increase to an individual provider's work week limit is no longer approved by the department, the individual provider's work week limit will revert to the level described in WAC 388-11-0030.

(3) The department may only approve a work week limit in excess of eighty service hours per week for an individual provider if the client's circumstances meet the criteria set out in WAC 388-440-0001(1)(a) through (e) and where the department is unaware of any reason that the individual provider will be unable to appropriately meet the needs of the client.

(4) The department will not approve additional service hours to an individual provider's work week limit that would exceed the client's monthly service hours.

(5) The individual provider is not entitled to an administrative hearing under chapter 34.05 RCW regarding the department's decision on whether to approve or continue a temporary increase to the work week limit.

NEW SECTION

WAC 388-114-0090 How does the individual provider work week limit affect the client's responsibilities listed in WAC 388-71-0505? In addition to the responsibilities detailed in WAC 388-71-0505, the client must:

(1) Manage his or her individual providers' work time to stay within each individual provider's total work week limit described in this chapter and within the total number of monthly authorized hours in the client's plan of care;

(2) Contact his or her case manager and participate in the search, selection, and hiring of additional providers when necessary to comply with subsection (1) of this section; and

(3) Choose a different provider when an individual provider is already working for one or more clients and the individual provider would exceed his or her work week limit by working for the client.

NEW SECTION

WAC 388-114-0100 How does the individual provider work week limit affect the individual provider's responsibilities in WAC 388-71-0515? In addition to the responsibilities detailed in WAC 388-71-0515, the individual provider must:

(1) Communicate and coordinate with each of his or her clients about how many service hours the individual provider is allowed and available to work each week; and

(2) Not accept assignments or changes in schedules for clients that would require the individual provider to work more than his or her work week limit unless it is to respond to an unexpected health or safety need of the client that cannot be postponed.

NEW SECTION

WAC 388-114-0110 What happens when an individual provider, who is a family member or household member, provides more care or services than authorized in the client's plan of care? The department will not pay an individual provider who is also a family or household member for care hours or services beyond the monthly authorized hours in the client's plan of care.

NEW SECTION

WAC 388-114-0120 What happens if an individual provider works more service hours in a work week than the individual provider's work week limit or claims unapproved travel or service hours or non-required training time? (1) If an individual provider works more service hours in a work week than the work week limit approved by the department or submits a claim for unapproved travel or service hours or non-required training time, the department may take any one or more of the following actions:

(a) Contact the individual provider to discuss the client's care needs and the individual provider's responsibilities under department rules and the individual provider's contract;

(b) Provide additional technical assistance to the individual provider and the client on how to comply with department rules and the individual provider contract;

(c) Give the individual provider and the client notice that continued failure by the individual provider to comply will result in termination of the individual provider's contract;

(d) Terminate the individual provider's contract and assist the client in finding another individual provider.

(2) Individual providers do not have a right to an administrative hearing under chapter 34.05 RCW to appeal contract terminations under this section.

NEW SECTION

WAC 388-114-0130 How is travel time approved and authorized? (1) Individual providers must provide an estimate of planned travel time and request approval from the department in advance of travel. The reasonableness of the request may be verified by the department using an online mapping tool.

(2) Travel time is calculated based upon the actual time to travel directly between worksites during each work day and is rounded to the nearest fifteen minutes. If more than one trip between worksites is made in a day, direct travel times are added together and rounded to the nearest fifteen minutes once each day.

(3) Regardless of the estimated travel time, individual providers may only bill for actual time spent traveling as calculated in subsection (2) of this section.

(4) If the individual provider has unexpected or unplanned travel time, the individual provider must contact the department to request approval and authorization for payment of the unplanned travel. The department will approve unplanned travel time requests related to client health and safety or due to traffic conditions outside the individual provider's control.

NEW SECTION

WAC 388-114-0140 Are there limitations on travel time? The department will not approve an individual provider to provide care for a client if the department determines, based on an online mapping tool, that the individual provider would regularly travel for more than sixty minutes between worksites or exceed a total of seven hours of travel time per work week.