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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

SSP 46-2021

CHAPTER 461
DEPARTMENT OF HUMAN SERVICES
SELF-SUFFICIENCY PROGRAMS

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FILING CAPTION: Temporary Amendments to two Overpayment Rules

EFFECTIVE DATE: 09/10/2021 THROUGH 03/08/2022

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NEED FOR THE RULE(S):

OAR 461-195-0501 about Definitions and Categories of Overpayments and 461-195-0521 about Calculation of Overpayments need to be changed in order to align the rules with the Department's many-year policy, which disallows medical assistance administrative error overpayments. They also need to be changed to adopt a new provision, which restricts effective April 21, 2021, the establishment of new medical assistance overpayments, except for fraud overpayments or overpayments caused by continued benefits pending the outcome of a contested case (hearing request).

JUSTIFICATION OF TEMPORARY FILING:

The Department finds that failure to act promptly by amending OAR 461-195-0501 and 461-195-0521 will result in serious prejudice to the public interest, the Department, and individuals who receive or have received medical assistance. The Department needs to proceed by temporary rule due to immediate necessity to ensure the Department's policies regarding establishment of administrative error and certain client error overpayments is clearly adopted into rule. These rule changes will align Oregon's rules with Department policies, as well as recent Department decisions. If these revisions are not made, the public, Department staff, oversight agencies, and any directly impacted individuals might not be aware of or be able to clearly understand ODHS medical assistance overpayment policies.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Correspondence between Office of Payment and Recovery and Oregon Health Authority available from Office of Payment and Recovery.

RULES:

461-195-0501, 461-195-0521

AMEND: 461-195-0501

RULE SUMMARY: OAR 461-195-0501 is being amended to adopt a new definition and criteria for medical assistance overpayment establishment, according to the guidance from the Centers for Medicare and Medicaid Services (CMS)

and Oregon Health Authority (OHA). The rule is also being amended to align the rule to Department current practice, which disallows administrative error overpayments in the General Assistance (GA) program. The amendment restricts establishment of new medical assistance overpayments to certain causes.

CHANGES TO RULE:

461-195-0501

Definitions and Categories of Overpayments ¶¶

This rule applies to benefits and services delivered under chapters 410, 411, and 461 of the Oregon Administrative Rules.¶¶

(1) "Overpayment" means:¶¶

(a) A benefit or service received by or on behalf of a client, or a payment made by the Department on behalf of a client, that exceeds the amount for which the client is eligible.¶¶

(b) A payment made by the Department and designated for a specific purpose which is spent by a person on an expense not approved by the Department.¶¶

(A) In the REF program, there is a rebuttable presumption that the full amount of cash benefits was improperly spent in violation of OAR 461-165-0010(8)(a) when cash benefits are used or accessed in Oregon, outside of Oregon, or on ¶Tribal lands at:¶¶

(i) Any liquor store (see OAR 461-165-0010);¶¶

(ii) Any casino, gambling casino, or gaming establishment (see OAR 461-165-0010);¶¶

(iii) Any retail establishment that provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment; or¶¶

(iv) Any marijuana dispensary.¶¶

(B) In the SFPSS and TANF programs, there is a rebuttable presumption that the full amount of cash benefits was improperly spent in violation of OAR 461-165-0010(9)(a) when cash benefits are used or accessed in Oregon, outside of Oregon, or on ¶Tribal lands at:¶¶

(i) Any liquor store;¶¶

(ii) Any casino, gambling casino, or gaming establishment;¶¶

(iii) Any retail establishment that provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment; or¶¶

(iv) Any marijuana dispensary.¶¶

(C) The rebuttable presumptions in paragraphs (A) and (B) of this section also apply when an individual in a location covered in paragraphs (A) or (B) uses or accesses cash benefits from a private bank account.¶¶

(c) A payment for child care made by the Department to, or on behalf of, a client that:¶¶

(A) Is paid to an ineligible provider;¶¶

(B) Exceeds the amount for which a provider is eligible;¶¶

(C) Is paid when the client was not engaged in an activity that made the client eligible for child care, such as an activity of the JOBS program (see OAR 461-001-0025 and 461-190-0151 to 461-190-0401);¶¶

(D) Is paid when the client was not eligible for child care benefits; or¶¶

(E) Has given an electronic benefit transfer (EBT) card, card number, or personal identification number (PIN) to a provider for the purpose of checking a child (see OAR 461-001-0000) in or out from the provider's child care.¶¶

(d) A misappropriated payment when a person cashes and retains the proceeds of a check from the Department on which that person is not the payee and the check has not been lawfully endorsed or assigned to the person.¶¶

(e) A benefit or service provided for a need when that person is compensated by another source for the same need and the person fails to reimburse the Department when required to do so by law.¶¶

(f) A cash benefit received by an individual in the GA or SFPSS programs for each month for which the client receives a retroactive SSI lump sum payment.¶¶

(g) In the TA-DVS program, a payment made by the Department to an individual or on behalf of an individual when the individual intentionally and without intimidation or coercion by an abuser:¶¶

- (A) Makes a false or misleading statement or misrepresents, conceals, or withholds information for the purpose of establishing eligibility (see OAR 461-001-0000) for or receiving a benefit from the TA-DVS program; or¶
- (B) Commits any act intended to mislead or misrepresent, conceal, or withhold information for the purpose of establishing eligibility for or receiving a benefit from the TA-DVS program.¶
- (2) The Department may establish an overpayment for the initial month (see OAR 461-001-0000) of eligibility under circumstances including, but not limited to:¶
 - (a) The filing group (see OAR 461-110-0310), ineligible student, or authorized representative (see OAR 461-115-0090) withheld information;¶
 - (b) The filing group, ineligible student, or authorized representative provided inaccurate information;¶
 - (c) The Department failed to use income reported as received or anticipated in determining the benefits of the filing group; or¶
 - (d) The error was due to an error in computation or processing by the Department.¶
- (3) In the HSD medical programs (see OAR 461-001-0000), the Department may establish an overpayment for the budget month (see OAR 410-200-0015) when the HSD medical programs eligibility determination group (see OAR 410-200-0015) or authorized representative (see OAR 410-200-0015) withheld or provided inaccurate information. Retroactively effective April 21, 2021, for medical assistance the Department:¶
 - (a) Shall not establish an administrative error overpayment.¶
 - (b) Shall not establish a client error overpayment unless an individual received unreduced liability or unreduced benefits pending a contested case hearing decision or other final order favorable to the Department, and¶
 - (c) May establish a fraud overpayment when a court determines the individual made a false or misleading statement or misrepresented, concealed, or withheld a fact for the purpose of establishing or maintaining eligibility.¶
- (4) Overpayments are categorized as follows:¶
 - (a) An administrative error overpayment is an overpayment caused by any of the following circumstances:¶
 - (A) The Department fails to reduce, suspend, or end benefits after timely reporting by the filing group, ~~HSD medical programs eligibility determination group~~, ineligible student, or authorized representative (see OAR 461-115-0090 and ~~410-200-0015~~) of a change covered under OAR 461-170-0011 or ~~410-200-0235~~ and that reported change requires the Department to reduce, suspend, or end benefits;¶
 - (B) The Department fails to use the correct benefit standard;¶
 - (C) The Department fails to compute or process a payment correctly based on accurate information timely provided by the filing group, ~~HSD medical programs eligibility determination group~~, ineligible student, or authorized representative;¶
 - (D) In the ~~GA and SFPSS~~ programs, the Department fails to require a client to complete an interim assistance agreement; or¶
 - (E) The Department commits a procedural error that was no fault of the filing group, ~~HSD medical programs eligibility determination group~~, ineligible student, or authorized representative.¶
 - (b) A client error overpayment is any of the following:¶
 - (A) An overpayment caused by the failure of a filing group, ~~HSD medical programs eligibility determination group~~, ineligible student, or authorized representative to declare or report information or a change in circumstances as required under OAR 461-170-0011 or ~~410-200-0235~~, including information available to the Department, that affects the client's eligibility to receive benefits or the amount of benefits.¶
 - (B) A client's unreduced liability or receipt of unreduced benefits pending a contested case hearing decision or other final order favorable to the Department.¶
 - (C) A client's failure to return a benefit known by the client to exceed the correct amount.¶
 - (D) A client's use of a JOBS or SFPSS program support payment (see OAR 461-190-0211) for other than the intended purpose.¶
 - (E) A payment for child care when the client was not engaged in an activity that made the client eligible for child care, such as an activity of the JOBS program (see OAR 461-001-0025 and OAR 461-190-0151 to OAR 461-190-0401).¶

- (F) A payment for child care when the client was not eligible for child care benefits.¶
- (G) The failure of a client to pay their entire share of the cost of services or the participant fee (see OAR 461-160-0610 and 461-160-0800) in the month in which it is due.¶
- (H) An overpayment caused by a client giving an electronic benefit transfer (EBT) card, card number, or personal identification number (PIN) to a provider for the purpose of checking a child in or out from the provider's child care.¶
- (I) In the REF, SFPSS, and TANF programs, an overpayment caused by the client using or accessing cash benefits in any electronic benefit transaction in any liquor store; casino, gambling, or gaming establishment; retail establishment that provides adult-oriented entertainment in which performers disrobe or perform in an unclad state for entertainment; or marijuana dispensary (see OAR 461-165-0010).¶
- (c) A fraud overpayment is an overpayment determined to be an intentional program violation (see OAR 461-195-0601 and 461-195-0611) or substantiated through a criminal prosecution court determining the individual made a false or misleading statement or misrepresented, concealed, or withheld a fact for the purpose of establishing or maintaining eligibility.¶
- (d) In the SNAP program, a provider error overpayment is an overpayment made to a drug or alcohol treatment center or residential care facility that acted as a client's authorized representative.¶
- (e) In the child care program, a provider error overpayment is a payment made by the Department on behalf of a client to a child care provider when:¶
 - (A) Paid to an ineligible provider; or¶
 - (B) The payment exceeds the amount for which a provider is eligible.¶
- (5) When an overpayment is caused by both an administrative and client error in the same month, the Department determines the primary cause of the overpayment and assigns as either an administrative or client error overpayment.¶
- (6) In the TANF and TA-DVS programs, when an overpayment puts the client at greater risk of domestic violence (see OAR 461-001-0000), the overpayment is waived (see OAR 461-135-1200).¶
- (7) Except as provided in section (8) of this rule, the Department establishes an overpayment when the following thresholds are exceeded:¶
 - (a) Administrative error overpayments concerning:¶
 - (A) Cash and child care programs, when the amount is greater than \$200;¶
 - (B) SNAP open case, when the amount is greater than \$100; and¶
 - (C) SNAP closed case, when the amount is greater than \$200.¶
 - (b) Client error overpayments in:¶
 - (A) Cash and child care programs, when the amount is greater than \$200;¶
 - (B) SNAP open case, when the amount is greater than \$100; and¶
 - (C) SNAP closed case, when the amount is greater than \$200;¶
 - ~~(D) Medical programs, when the amount is greater than \$750.¶~~
 - (c) Provider error overpayments in:¶
 - (A) Cash and child care programs, when the amount is greater than \$200;¶
 - (B) SNAP open case, when the amount is greater than \$100;¶
 - (C) SNAP closed case, when the amount is greater than \$200.¶
- (8) There are no overpayment thresholds in all of the following situations:¶
 - (a) In SNAP program, if the overpayment was identified in a quality control review.¶
 - (b) In all programs, if the overpayment was caused by a client's receipt of continuing benefits in a contested case.¶
 - (c) In all programs, if the overpayment was caused by possible fraud by a client or provider.

Statutory/Other Authority: ORS 409.050, 411.060, 411.070, 411.081, 411.404, 411.816, 412.001, 412.014, 412.049, HB 2089 (2013, Section 10)

Statutes/Other Implemented: ORS 409.010, 411.060, 411.070, 411.081, 411.117, 411.404, 411.620, 411.640, 411.690, 411.816, 411.892, 412.001, 412.014, 412.049, 414.025, 416.350

AMEND: 461-195-0521

RULE SUMMARY: OAR 461-195-0521 is being amended to align the rule with Department policy, that the Department shall not establish administrative error overpayments for medical assistance. The rule is also being amended to adopt a new definition and criteria for medical assistance overpayment establishment, according to the guidance from the Centers for Medicare and Medicaid Services (CMS) and Oregon Health Authority (OHA). The amendment restricts establishment of new medical assistance overpayments to certain causes.

CHANGES TO RULE:

461-195-0521

Calculation of Overpayments ¶¶

This rule specifies how the Department calculates an overpayment (see OAR 461-195-0501).¶¶

- (1) The Department calculates an overpayment by determining the amount the individual received, or the payment made by the Department on behalf of the individual that exceeds the amount for which the individual was eligible.¶¶
- (2) When a filing group, HSD medical programs (see OAR 461-001-0000) eligibility determination group (see OAR 410-200-0015), ineligible student, or authorized representative (see OAR 461-115-0090 and OAR 410-200-0015) fails to report income, the Department establishes, calculates and determines the overpayment by assigning unreported income to the applicable budget month without averaging the unreported income, except:¶¶
 - (a) An individual's earned income reported quarterly from the Employment Department is considered received by the individual in equal amounts during the months identified in the report.¶¶
 - (b) In the ERDC, REF, SNAP, and TANF programs, an individual's actual self-employment income is annualized retrospectively to calculate the overpayment.¶¶
 - (c) In the HSD medical programs, if actual income is not available for the months in which an overpayment occurred, an individual's actual self-employment income (see OAR 410-200-0015) received during the year when an overpayment occurred is annualized to calculate an overpayment.¶¶
 - (d) In all programs, if verification of self-employment income is not provided to the Department following the issuance of a subpoena, or is not yet available to the individual, self-employment income from a prior year is annualized prospectively to calculate an overpayment. There is a rebuttable presumption that self-employment income from the prior year is representative of actual self-employment income for the time of overpayment. The presumption may be rebutted only by clear and convincing evidence. ¶¶
- (3) The Department establishes, calculates, and determines an administrative error overpayment (see OAR 461-195-0501) based on information initially provided by a filing group, ~~HSD medical programs eligibility determination group~~, ineligible student, or authorized representative. The Department may calculate the administrative error overpayment by using any of the following:¶¶
 - (a) Correct prospective budgeting (see OAR division 461-150 and ~~division 410-200~~) based on information initially provided; or if it results in a lower overpayment amount;¶¶
 - (b) Actual income; or¶¶
 - (c) Averaging an individual's earned income reported quarterly from the Employment Department.¶¶
- (4) When using prospective budgeting (see OAR division 461-150) and the actual income differs from the amount determined under OAR 461-150-0020(2), there may be a client error overpayment (see OAR 461-195-0501) only when the filing group, ineligible student, or authorized representative withheld information, failed to report a change, or provided inaccurate information. In such a case, the Department uses the actual income to determine the amount of an overpayment.¶¶
- (5) ~~When using anticipated income for the HSD medical programs and the actual income differs from the amount determined under OAR 410-200-0310, Department uses actual income to determine there may be a client error overpayment only when the HSD medical programs eligibility determination group or authorized representative (see OAR 410-200-0015) knowingly withheld information, failed to report a change, or provided inaccurate information. In such a case, the Department uses the actual income to determine the amount of an overpayment~~

amount of a medical assistance overpayment caused by possible fraud.

(6) When a filing group, ineligible student, or authorized representative fails to report all earned income within the reporting time frame, the earned income deduction (see OAR 461-160-0160, 461-160-0190, 461-160-0430, 461-160-0550, and 461-160-0552) is applied as follows:

(a) In the OSIP, OSIPM, QMB, and REFM programs, the Department allows the earned income deduction.

(b) In the REF and TANF programs, the Department allows the earned income deduction when good cause (see section (6) of this rule) exists.

(c) In the SNAP program, no deduction is applied to earned income if the amount or source of income was not timely reported.

(7) For the purposes of OAR 461-195-0501 to 461-195-0561, "good cause" means circumstances beyond the individual's reasonable control that caused the individual to be unable to report income timely and accurately.

(8) When support is retained:

(a) In the TANF program, the amount of support (other than cash medical support) the Department of Justice retains as a current reimbursement each month is added to other income to determine eligibility (see OAR 461-001-0000). When an individual is not eligible for TANF program benefits, the overpayment is offset by the support the Department of Justice retains as a current reimbursement.

(b) ~~In the For medical programs assistance,~~ the amount of the cash medical support the Department retains each month is excluded income and not used to determine eligibility ~~for medical program benefits.~~ When an individual has incurred a medical program assistance overpayment, the overpayment is offset by the amount of the cash medical support the Department retains during each month of the overpayment.

(9) In the REF and TANF programs, when an individual directly receives support used to determine eligibility or calculate benefits, the overpayment is:

(a) If still eligible for REF or TANF program benefits, the amount of support the individual received directly; or

(b) If no longer eligible for REF or TANF program benefits, the amount of program benefits the individual received.

(10) When an overpayment occurs due to the failure of an individual to reimburse the Department, when required by law to do so, for benefits or services (including cash medical support) provided for a need for which that individual is compensated by another source, the overpayment is limited to the lesser of the following:

(a) The amount of the payment from the Department;

(b) Cash medical support; or

(c) The amount by which the total of all payments exceeds the amount payable for such a need under the Department's rules.

(11) Benefits paid during a required notice period (see OAR 461-175-0050, OAR 410-200-0120) are included in the calculation of the overpayment when:

(a) The filing group, HSD medical programs eligibility determination group, ineligible student, or authorized representative (see OAR 461-115-0090 and OAR 410-200-0015) failed to report a change within the reporting time frame under OAR 461-170-0011 or OAR 410-200-0235; and

(b) Sufficient time existed for the Department to adjust the benefits to prevent the overpayment if the filing group, HSD medical programs eligibility determination group, ineligible student, or authorized representative (see OAR 461-115-0090 and OAR 410-200-0015) had reported the change at any time within the reporting time frame.

(12) In the SNAP program, if the benefit group (see OAR 461-110-0750) was categorically eligible under OAR 461-135-0505, there is no overpayment based on resources.

(13) In the OSIP and OSIPM programs, when a individual does not pay their share of the cost of services (see OAR 461-160-0610) or the OSIP-EPD or OSIPM-EPD program participant fee (see OAR 461-160-0800) in the month in which it is due, an overpayment is calculated as follows:

(a) All payments made by the Department on behalf of the individual during the month in question are totaled, including but not limited to any payment for:

(A) Capitation;

(B) Long term care services;

- (C) Medical expenses for the month in question;¶¶
- (D) Medicare buy-in (when not concurrently eligible for an MSP);¶¶
- (E) Medicare Part D;¶¶
- (F) Mileage reimbursement;¶¶
- (G) Special needs under OAR 461-155-0500 to 461-155-0710; and¶¶
- (H) Home and community-based care (see OAR 461-001-0030), including home delivered meals and non-medical transportation.¶¶

(b) Any partial or late liability payment made by an individual receiving home and community-based care in-home services or participant fee paid by an OSIP-EPD or OSIPM-EPD program participant is subtracted from the total calculated under subsection (a) of this section. The remainder, if any, is the amount of the overpayment.¶¶

(14) When an individual's liability is unreduced pending the outcome of a contested case hearing about that liability the overpayment is the difference between the liability amount determined in the final order and the amount, if any, the individual has repaid.¶¶

(15) ~~In the HSD medical programs, OSIPM, QMB, and REF program~~ For medical assistance, if the individual was not eligible for one program, but during the period in question was eligible for another program:¶¶

~~(a) With the same benefit level, there is no overpayment.¶¶~~

~~(b) With a lesser benefit level, the overpayment is the amount of medical program benefit payments made on behalf of the individual exceeding the amount for which the individual was eligible.¶¶~~

~~(16) When an overpayment is caused by administrative error (see OAR 461-195-0501), any overpayment of GA, OSIP, REF, SFPSS, or TANF program benefits is not counted as income when determining eligibility for the HSD medical programs, OSIPM, and REF programs.¶¶~~

~~(17)~~ 16 Credit against an overpayment is allowed as follows:¶¶

(a) In the GA, REF, and TANF programs, a credit is allowed for an individual's payment for medical ~~servi~~ assistances made during the period covered by the overpayment, in an amount not to exceed the Department fee schedule for the service, but credit is not allowed for an elective procedure unless the Department authorized the procedure prior to its completion.¶¶

(b) In the SNAP program, if the overpayment was caused by unreported earned income, verified child care costs are allowed as a credit to the extent the costs would have been deductible under OAR 461-160-0040 and 461-160-0430.¶¶

(c) In all programs, for an underpayment of benefits in the program in which the overpayment occurred.¶¶

~~(18)~~ 7 In the REF program, when an individual used or accessed cash benefits in violation of OAR 461-165-0010(8)(a), the amount of the overpayment is the amount of cash benefits the individual used or accessed.¶¶

~~(19)~~ 8 In the SFPSS and TANF programs, when an individual used or accessed cash benefits in violation of OAR 461-165-0010(9)(a), the amount of the overpayment is the amount of cash benefits the individual used or accessed.

Statutory/Other Authority: ORS 329A.500, 413.085, 414.685, ORS 409.050, 411.060, 411.070, 411.404, 411.660, 411.706, 411.816, 412.014, 412.049, 412.124, 414.231

Statutes/Other Implemented: ORS 329A.500, ORS 409.010, 411.060, 411.070, 411.404, 411.620, 411.630, 411.635, 411.640, 411.660, 411.690, 411.706, 411.816, 412.014, 412.049, 412.124, 414.231, 416.350