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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

SSP 51-2023

CHAPTER 461

DEPARTMENT OF HUMAN SERVICES

SELF-SUFFICIENCY PROGRAMS

FILED

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ARCHIVES DIVISION
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& LEGISLATIVE COUNSEL

FILING CAPTION: Temporary Rule Changes to APD Definitions and Asset Transfer Disqualification Period Start Date

EFFECTIVE DATE: 12/11/2023 THROUGH 06/07/2024

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NEED FOR THE RULE(S):

OAR 461-001-0030 about Definitions; OSIP, OSIPM or Home and Community-Based Care needs to be amended because the terms and definitions in this rule are incomplete compared to federal policy. The changes made in this filing clarify who this rule impacts and aligns the rule with federal policy and current Oregon Department of Human Services ONE system functionality.

OAR 461-140-0296 about Length of Disqualification Due to an Asset Transfer; OSIPM needs to be amended to clarify that the provisions in this rule apply to individuals receiving or applying for nursing facility services and home and community-based care. This rule also needs to be amended to change the date an asset transfer disqualification period begins for individuals who make a disqualifying asset transfer while they are already receiving Department-paid nursing facility services or home and community-based care. This change ensures federally required disqualification periods are applied equitably to all impacted individuals. Previously, when the Department discovered a disqualifying asset transfer that was not reported timely, the Department retroactively recouped benefits back to the month following the date of the transfer through the overpayment recovery process. This has changed based on guidance from the Center for Medicare and Medicaid Services, and the Department is no longer pursuing overpayments in this situation. As a result, the Department must change the date the disqualification period begins in order to avoid shortened or eliminated disqualification periods for individuals who do not report asset transfers as required by OAR 461-170-0011. By amending the begin date from the first of the month after the transfer to the first of the month following the timely notice period, the Department may apply federally required disqualification periods more equitably, regardless of when the asset transfer is discovered.

JUSTIFICATION OF TEMPORARY FILING:

The Department finds that failure to act promptly by amending OAR 461-001-0030 and 461-140-0296 will result in serious prejudice to the public interest, the Department, and individuals applying for or receiving Department-paid nursing facility services or home and community-based care. The Department needs to proceed by temporary rules because the length of time needed to establish permanent rules could cause inequitable disqualification periods for individuals receiving Department-paid nursing facility services or home and community-based care. In addition, failure

to act immediately would put Department rules out of alignment with federal guidance and ONE system functionality, which could result in confusion for the public and Department staff who determine eligibility. Proceeding by temporary rules ensures immediate guidance is in place for Department staff to make accurate and more equitable eligibility decisions.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Electronic mail from the state of Wisconsin Department of Health, Division of Medicaid Services concerning interpretation of federal law is available upon request from the Oregon Aging and People with Disabilities medical policy unit.

RULES:

461-001-0030, 461-140-0296

AMEND: 461-001-0030

RULE SUMMARY: OAR 461-001-0030 is being amended to update the definitions of community spouse, institutionalized spouse, and home and community-based care. In addition, it is being amended to clarify to whom this rule applies.

CHANGES TO RULE:

461-001-0030

Definitions; OSIP; ~~OSIPM Long-Term Care~~ M Nursing Facility Services or Home and Community-Based Care ¶

These terms apply to rules in Chapter 461 about OSIP ~~and OSIPM long-term care~~ M nursing facility services and home and community-based care ~~clients~~: ¶

(1) Community spouse: An individual who is legally married (see OAR 461-001-0000) to an institutionalized spouse ~~and is not in a medical institution or nursing facility~~ (see section (5) of this rule) and meets all of the following requirements: ¶

(a) The individual is not residing in the Oregon State Hospital, or its equivalent if residing in another state. ¶

(b) The individual is not residing in an acute care hospital or nursing facility for a continuous period of care (see section (2) of this rule). ¶

(2) Continuous period of care: Reside for a period of at least 30 consecutive days or until death in a ~~long-term care~~ nursing facility, home and community-based care (see section (4) of this rule) setting, or an acute care hospital. There must be sufficient evidence to show there is a reasonable expectation that the client will remain in care for at least 30 consecutive days. For the purposes of this policy, an interruption in care (for example, leaving and then returning to a nursing home, or switching from one type of care to another) that lasts less than 30 days is not considered a break in the 30 consecutive days of care. A new period of care begins if care is interrupted for 30 or more days. ¶

(3) Eligible dependent: ¶

(a) For cases with a community spouse (see section (1) of this rule): ¶

(A) An "eligible dependent" is one of the following: ¶

(i) A child of the institutionalized spouse or community spouse who resides with the community spouse, and who must also be either a minor (under the age of 21) or 21 or older but still a tax dependent of either spouse. ¶

(ii) A parent or sibling of the institutionalized spouse or community spouse who resides with the community spouse and is claimed as a tax dependent by either spouse. ¶

(B) A grandchild of the institutionalized spouse or community spouse is not considered an "eligible dependent". ¶

(b) For cases without a community spouse, an "eligible dependent" resides with the institutionalized spouse and is either a minor child (under the age of 21) of the institutionalized spouse, or a child 21 or older but still a tax dependent of the institutionalized spouse. ¶

(4) Home and community-based care: Title XIX services needed to keep an individual out of a ~~long-term care facility~~ nursing facility or an intermediate care facility for individuals with intellectual disabilities (ICF-ID), not including 1915(i) Home and community-based services (see division 173 of OAR chapter 410). These services are: ¶

(a) In-home services except for state plan personal care services. ¶

(b) Residential care facility services. ¶

- (c) Assisted living facility services.¶
 - (d) Adult foster care services.¶
 - (e) ~~Home adaptations to accommodate a client's physical condition.¶~~
 - (f) ~~Home-delivered meals provided in conjunction with in-home services.¶~~
 - (g) Specialized living facility services.¶
 - (h) Adult day care services.¶
 - (i) ~~Community transition services.¶~~
 - (5) ~~Home and Institutionalized spouse: An individual who is married to a community-based care client: A client receiving home and community-based care for a continuous period.¶~~
 - (6) Institutionalized spouse: An spouse, not residing in the Oregon State Hospital, or its equivalent if in another state, and meets one of the following requirements: ¶
 - (a) The individual who is in long-term care or receiving home and community-based care for a continuous period and is married to a community spouse is residing in an acute care hospital or nursing facility for a continuous period of care.¶
 - (b) The individual is applying for or receiving services in a nursing facility or home and community-based services.
- Statutory/Other Authority: 411.060, ORS 409.050, 411.083, 411.404, 413.085, 414.685
Statutes/Other Implemented: 411.060, 411.700, ORS 409.010, 411.083, 411.404, 42 USC 1396r, 42 CFR 435.726

AMEND: 461-140-0296

RULE SUMMARY: OAR 461-140-0296 is being amended to change the disqualification period start date for current recipients of Long-Term Services and Supports who make a disqualifying asset transfer. The start date is being updated from the month after the transfer occurred to the first of the month following the date the Department learns of the transfer and sends a timely continuing benefit decision notice. It is also being amended to replace references to long-term care and Oregon Supplemental Income Program Medical (OSIPM) with references to nursing facility and community-based care as the rule provisions are not limited to OSIPM recipients and apply to all individuals receiving and applying for long term services and supports. Finally, it is being amended to remove the section that addresses asset transfers that occurred before July 1, 2006, and to add a reference to a potential disqualifying transfer in section 6.

CHANGES TO RULE:

461-140-0296

Length of Disqualification Due to an Asset Transfer; OSIPM Nursing Facility Services or Home and Community-Based Care

(1) This rule applies to individuals in the OSIP and OSIPM programs who live in a nonstandard living arrangement applying for or receiving Department-paid nursing facility services or home and community-based care (see OAR 461-001-00030).

(2) A financial group (see OAR 461-110-0530) containing a member disqualified due to the transfer of an asset is disqualified from receiving benefits in individual who completes a disqualifying transfer of an asset in accordance with OARs 461-140-0210, 461-140-0220, 461-140-0242, and 461-140-0250 is disqualified from receiving Department-paid nursing facility services or home and community-based care. The length of a disqualification period resulting from the transfer is the number of months equal to the uncompensated value (see OAR 461-140-0250) for the transfer divided by the following dollar amount:

- (a) If the initial month (see OAR 461-001-0000) is prior to October 1, 1998--\$2,595.
- (b) If the initial month is on or after October 1, 1998 and prior to October 1, 2000--\$3,320.
- (c) If the initial month is on or after October 1, 2000 and prior to October 1, 2002--\$3,750.
- (d) If the initial month is on or after October 1, 2002 and prior to October 1, 2004--\$4,300.
- (e) If the initial month is on or after October 1, 2004 and prior to October 1, 2006--\$4,700.
- (f) If the initial month is on or after October 1, 2006 and prior to October 1, 2008--\$5,360.
- (g) If the initial month is on or after October 1, 2008 and prior to October 1, 2010--\$6,494.
- (h) If the initial month is on or after October 1, 2010 and prior to October 1, 2016--\$7,663.
- (i) If the initial month is on or after October 1, 2016 and prior to October 1, 2018--\$8,425.
- (j) If the initial month is on or after October 1, 2018 and prior to October 1, 2020---\$8,784.
- (k) If the initial month is on or after October 1, 2020 and prior to October 1, 2022---\$9,551.
- (l) If the initial month is on or after October 1, 2022---\$10,342.

(3) For transfers by an individual and the spouse of an individual that occurred before July 1, 2006:

(a) Add together the uncompensated value of all transfers made in one calendar month and treat this total as one transfer.

(b) If the uncompensated value of the transfer is less than the applicable dollar amount identified in subsections (2)(a) to (2)(l) of this rule, there is no disqualification.

(c) If there are multiple transfers in amounts equal to or greater than the applicable dollar amount identified in subsections (2)(a) to (2)(l) of this rule, each disqualification period is calculated separately.

(d) The number of months resulting from the calculation in section (2) of this rule is rounded down to the next whole number.

(e) Except as provided in subsection (3)(f) of this rule, the first month of the disqualification is the month the asset was transferred.

(f) If disqualification periods calculated in accordance with this rule overlap, the periods are applied sequentially so that no two penalty periods overlap.

(g) If both spouses of a couple are in a nonstandard living arrangement, part of the disqualification is apportioned to each of them. If one member of the couple is serving a disqualification when the other member of the couple begins living in a nonstandard living arrangement, any remaining disqualification is apportioned equally to each member of the couple. If one spouse is unable to serve the resulting disqualification period for any reason, the remaining disqualification applicable to both spouses must be served by the remaining spouse.

(4) For transfers by an individual and the spouse of an individual that occurred on or after July 1, 2006:

(a) If there are multiple transfers by the individual and the spouse of the individual, including any transfer less than

the applicable dollar amount identified in subsections (2)(a) to (2)(l) of this rule, the value of all transfers are added together before dividing by the applicable dollar amount identified in subsections (2)(a) to (2)(l) of this rule.¶
(b) The quotient resulting from the calculation in section (2) of this rule is not rounded. The whole number of the quotient is the number of full months the financial group is disqualified. This number might be zero full months. The remaining decimal or fraction of the quotient is used to calculate a partial month disqualification, which may be in addition to one or more full months. This remaining decimal or fraction is converted to a number of days by multiplying the decimal or fraction by the number of days in the month following the last full month of the disqualification period, if any. If this calculation results in a fraction of a day, the fraction of a day is rounded down.¶

(c) ~~Notwithstanding when the Department learns of a disqualifying transfer, the first month of~~The date the disqualification begins is:¶

(A) For an individual who transfers an asset while they are already receiving Department-paid long-term care (see OAR 461-001-0000) or home and community-based care (see OAR 461-001-0030) in a nonstandard living arrangement, ~~the month following the month the asset was transferred~~nursing facility services or home and community-based care, the first of the month following the date the Department learns the asset was transferred in accordance with the timely continuing benefit decision notice period (see OAR 461-175-0050), except that if disqualification periods calculated in accordance with this rule overlap, the periods are applied sequentially so that no two penalty periods overlap.¶

(B) For an applicant who transfers an asset prior to submitting an application and being determined eligible and for an individual who transfers an asset while they are already receiving benefits in a standard living arrangement (see OAR 461-001-0000), the date of request (see OAR 461-115-0030) for ~~long-term care~~nursing facility services or home and community-based care as long as the applicant or individual would otherwise be eligible but for this disqualification period. If the applicant or individual is not otherwise eligible on the date of request, the disqualification begins the first date following the date of request that the applicant or individual would be otherwise eligible but for the disqualification period.¶

(d) If both spouses of a couple are ~~in a nonstandard living arrangement~~applying for or receiving Department-paid nursing facility services or home and community-based care, part of the disqualification is apportioned to each of them. If one member of the couple is serving a disqualification when the other member of the couple ~~begins living in a nonstandard living arrangement~~applies for or starts receiving Department-paid nursing facility services or home and community-based care, any remaining disqualification is apportioned equally to each member of the couple. If one spouse is unable to serve the resulting disqualification period for any reason, the remaining disqualification applicable to both spouses must be served by the remaining spouse.¶

(54) If an asset is owned by more than one person, by joint tenancy, tenancy in common, or similar arrangement, the share of the asset owned by the individual is considered transferred when any action is taken either by the individual or any other person that reduces or eliminates the individual's control or ownership in the individual's share of the asset.¶

(65) For an annuity that is a disqualifying transfer under section (11) of OAR 461-145-0022, the disqualification period is calculated based on the uncompensated value as calculated under OAR 461-140-0250, unless the only requirement that is not met is that the annuity pays beyond the actuarial life expectancy of the annuitant. If the annuity pays beyond the actuarial life expectancy of the annuitant, the disqualification is calculated according to section (76) of this rule.¶

(76) If an individual or the spouse of an individual purchases an annuity on or before December 31, 2005 ~~or there is a potential disqualifying transfer under section (11) of OAR 461-145-0022,~~ and the only requirement that is not met is that the annuity pays benefits beyond the actuarial life expectancy of the annuitant, as determined by the Period Life Table of the Office of the Chief Actuary of the Social Security Administration, a disqualification period is assessed for the value of the annuity beyond the actuarial life expectancy of the annuitant.¶

(87) Effective January 1, 2023, the Department ends the disqualifications previously established under this rule based on an income cap trust.

Statutory/Other Authority: ORS 413.085, 414.685, ORS 409.050, 411.060, 411.704, 411.706

Statutes/Other Implemented: 42 USC 1396p, ORS 409.010, 411.060, 411.704, 411.706