



**TO:** Medical Care Advisory Committee  
**DATE:** November 12, 2020  
**FROM:** Victoria Grady  
Director of Provider Finance

**SUBJECT:** COVID-19 Rate Increase Attestation Process

**Agenda Item No.: 12**

**New Rule:** §355.205, relating to Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19).

**BACKGROUND:**  Federal Requirement  Legislative Requirement  Other:  
Response to Novel Coronavirus (COVID-19)

The Texas Health and Human Services Commission (HHSC) proposes in Texas Administrative Code (TAC) Title 1, Part 15, Chapter 355, Subchapter B, §355.205, relating to Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19), to describe the process by which HHSC will restrict providers from using the increased reimbursement rates to increase hourly wages paid to direct care staff on an ongoing basis in accordance with the contingencies placed upon use of the funds. Use of the funds for staff compensation is limited to overtime payments, lump sum bonuses, bonuses for hazard pay, or other types of compensation that will not result in future reductions to hourly wages when the emergency temporary reimbursement rate increase is discontinued. Reimbursement rates were increased effective April 1, 2020, to ensure that these providers are able to purchase personal protective equipment, ensure adequate staff-to-client ratios, and take other necessary steps to serve clients individually rather than in congregate settings to protect the health and safety of the clients in their care.

This new rule is based on an existing emergency rule adopted in response to the COVID-19 pandemic: §355.205, Emergency Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19). The provisions of this new rule are the same as the emergency rule. Except for a minor edit in the title of the rule and a clarifying edit in the text, there are no changes.

**ISSUES AND ALTERNATIVES:**

There are no alternatives to this proposal, it was implemented in response to the COVID-19 public health emergency for specified providers.

**STAKEHOLDER INVOLVEMENT:**

This rulemaking is expedited as it is to continue the provisions of the emergency rule. External stakeholder involvement during the rule development process was minimal due to the urgent nature of the rule.

**FISCAL IMPACT:**

None       Yes

**RULE DEVELOPMENT SCHEDULE:**

October 23, 2020	Publish proposed rules in <i>Texas Register</i>
November 12, 2020	Present to the Medical Care Advisory Committee
November 19, 2020	Present to HHSC Executive Council
December, 2020	Publish adopted rules in <i>Texas Register</i>
December, 2020	Effective date

**REQUESTED ACTION: (Check appropriate box)**

- The MCAC recommends approval of the proposed rules for publication.
- Information Only

TITLE 1                   ADMINISTRATION  
PART 15                   TEXAS HEALTH AND HUMAN SERVICES COMMISSION  
CHAPTER 355            REIMBURSEMENT RATES  
SUBCHAPTER B          ESTABLISHMENT AND ADJUSTMENT OF REIMBURSEMENT  
                                  RATES FOR MEDICAID

PROPOSED PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes in Texas Administrative Code (TAC) Title 1, Part 15, Chapter 355, Subchapter B, new §355.205, concerning Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19).

BACKGROUND AND PURPOSE

The proposed new rule outlines the process by which HHSC will restrict eligible Medicaid providers from using temporarily increased reimbursement rates to increase hourly wages paid to direct care staff on an ongoing basis. In accordance with the contingencies placed upon use of the funds, use of the funds for staff compensation is limited to overtime payments, lump sum bonuses, bonuses for hazard pay, or other types of compensation that will not result in future reductions to hourly wages when the emergency temporary reimbursement rate increase is discontinued. Reimbursement rates were increased effective April 1, 2020, to ensure that these providers are able to purchase personal protective equipment, ensure adequate staff-to-client ratios, and take other necessary steps to serve clients individually rather than in congregate settings to protect the health and safety of the clients in their care.

This new rule is based on an existing emergency rule adopted in response to the COVID-19 pandemic: §355.205, Emergency Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19). The provisions of this new rule are the same as the emergency rule. Except for a minor edit in the title of the rule and a clarifying edit in the text, there are no changes.

SECTION-BY-SECTION SUMMARY

Proposed new §355.205(a) and (b) introduce the emergency reimbursement and outline eligibility criteria for the increases. Subsection (c) provides a deadline by which a provider must submit an electronic attestation or be subject to recoupment. Subsection (d) and (e) specify the reconciliation process and how overpayments will be recouped if a provider fails to submit the attestation required in subsection (c). Subsections (f) and (g) provide guidance on procedures in the event of a disallowance of federal funds and the termination of the emergency temporary rate increases.

## FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, there will be no fiscal impact on state government because of enforcing and administering the rule.

## GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule will be in effect:

- (1) the proposed rule will not create or eliminate a government program;
- (2) implementation of the proposed rule will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;
- (4) the proposed rule will not affect fees paid to HHSC;
- (5) the proposed rule will create a new rule;
- (6) the proposed rule will not expand, limit, or repeal existing rule;
- (7) the proposed rule will not change the number of individuals subject to the rule; and
- (8) HHSC has insufficient information to determine the proposed rule's effect on the state's economy.

## SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there is no adverse economic impact on small businesses, micro-businesses, and rural communities required to comply with the new rule as there is no requirement to alter current business practices. The attestation requirement is currently in place.

## LOCAL EMPLOYMENT IMPACT

There is no anticipated negative impact on local economy.

## COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to receive a source of federal funds and is necessary to protect the health, safety, and welfare of the residents of this state.

## PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the rule is in effect, the public will benefit from adoption of the new rule. The public benefit anticipated as a result of enforcing or administering the new rule is availability of temporary emergency rate increases for impacted providers in response to the Novel Coronavirus (COVID-19).

Trey Wood has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule as the rule does not impose any new fees or costs on those required to comply.

## TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

## PUBLIC COMMENT

Questions about the content of this proposal may be directed to HHSC Provider Finance Department emergency line at 512-730-7401.

Written comments on the proposal may be submitted to the HHSC Provider Finance Department, Mail Code H-400, 4900 North Lamar Blvd., Austin, TX 78714-9030; by fax to (512)-730-7475; or by email to [RateAnalysisDept@hhsc.state.tx.us](mailto:RateAnalysisDept@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) faxed or emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When faxing or emailing comments, please indicate "Comments on Proposed Rule 21R015" in the subject line.

## STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code §531.0055, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system; Texas Government Code §531.033, which allows the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal

medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

The new rule affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

This agency hereby certifies that this proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

#### ADDITIONAL INFORMATION

For further information, please call: (512) 730-7401.

TITLE 1 ADMINISTRATION  
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION  
CHAPTER 355 REIMBURSEMENT RATES  
SUBCHAPTER B ESTABLISHMENT AND ADJUSTMENT OF REIMBURSEMENT RATES FOR MEDICAID

§355.205. Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19).

(a) Introduction. The Texas Health and Human Services Commission (HHSC) uses the methodology described in this section to establish emergency temporary reimbursement rate increases while limiting use of the funds received by the provider through the increases. This section also describes the circumstances in which recoupments will be necessary for certain provider types or services during the COVID-19 federal public health emergency period. Provider types and services that are eligible for increased reimbursement rates under this section include:

(1) all provider types and services for which a reimbursement rate methodology is described in this chapter; and

(2) any other provider or service that is established in response to COVID-19.

(b) Eligibility. To receive and retain emergency temporary reimbursement rate increases from HHSC under this section:

(1) the provider must be enrolled as a Medicaid provider with HHSC;

(2) the provider must be actively providing and billing for services provided to fee-for-service Medicaid clients;

(3) the provider must agree not to use the reimbursement rate increases to increase hourly wages paid to direct care staff on an ongoing basis, and to limit use of the funds to overtime payments, lump sum bonuses, bonuses for hazard pay, or other types of compensation that will not result in future reductions to hourly wages when the emergency temporary reimbursement rate increase is discontinued; and

(4) HHSC must receive approval from Centers for Medicare & Medicaid Services (CMS) for the provider type or specific service to be reimbursed through this section.

(c) Attestation of agreement. The provider must submit an electronic attestation of agreement to comply with subsection (b)(3) of this section either within 90 days of the effective date of the reimbursement rate increase, or by September 30, 2020, whichever date is later.

(d) Reconciliation process. HHSC uses the methodology in this subsection to recoup the temporary emergency payments made under this section if a provider fails to submit the attestation of agreement under subsection (c) of this section.

(1) HHSC will reduce reimbursement rates for any claim for services to the amount that would have been paid to the provider absent the emergency temporary reimbursement rate increase.

(2) The provider's claims will be reprocessed at the lower reimbursement rate under paragraph (1) of this subsection and an accounts receivable will be established.

(3) The provider will be paid on a normal per claim basis after the equivalent amount of the account receivable has been collected by HHSC, or its designee.

(4) After 270 days from the date of the establishment of the account receivable under paragraph (1) of this subsection, HHSC will recoup any overpayments owed under paragraph (1) of this subsection by demanding immediate repayment of any outstanding amount.

(e) Overpayment.

(1) If payments under this section result in an overpayment to a provider, HHSC, or its designee, may recoup an amount equivalent to the overpayment.

(2) Payments made under this section may be subject to any adjustments for payments made in error or due to fraud, including, without limitation, adjustments made under the Texas Administrative Code, the Code of Federal Regulations, and state and federal statutes. HHSC, or its designee, may recoup an amount equal to any such adjustments from the providers in question. This section may not be construed to limit the independent authority of another federal or state agency or organization to recover from the provider for a payment made due to fraud.

(f) Disallowance of federal funds. If payments under this section are disallowed by CMS, HHSC may recoup the amount of the disallowance from providers that participated in the program associated with the disallowance. If the recoupment from a provider for such a disallowance results in a subsequent disallowance, HHSC will recoup the amount of that subsequent disallowance from the same entity.

(g) Termination of emergency temporary rate increases. HHSC will terminate the emergency temporary rate increases at the earlier of either the termination of the federally declared public health emergency, including any extensions, or at the time that HHSC determines rate increases are no longer necessary pursuant to §355.201(c)(3) of this chapter (relating to Establishment and Adjustment of Reimbursement Rates for Medicaid). However, HHSC will continue to enforce the reconciliation and recoupment processes described in subsections (d), (e), and (f) of this section after the termination of the temporary emergency rate increases.