

STATE OF WISCONSIN
PHARMACY EXAMINING BOARD

IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : PHARMACY EXAMINING BOARD
PHARMACY EXAMINING BOARD : ADOPTING RULES
: (CLEARINGHOUSE RULE 21-071)

ORDER

An order of the Pharmacy Examining Board to repeal and recreate ch. Phar 8 relating to requirements for controlled substances.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted: s. 961.31, Stats.

Statutory authority: ss. 15.08 (5) (b), 450.11 (1b) (a) 1, 450.02 (2), 450.02 (3) (a), (b) (d) and (e), 961.31, and 961.38 (2), Stats.

Explanation of agency authority:

Section 15.08 (5) (b) provides that the board “[s]hall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.”

Section 450.11 (1b) (a) 1 states ““Health care facility” means a facility, as defined in s. 647.01 (4); any hospital, nursing home, community-based residential facility, county home, county infirmary, county hospital, county mental health complex, or other place licensed or approved by the department of health services under s. 49.70, 49.71, 49.72, 50.03, 50.032, 50.033, 50.034, 50.35, 51.08, or 51.09; a facility under s. 45.50, 51.05, 51.06, 233.40, 233.41, 233.42, or 252.10; and any other facility identified by the board by rule.”

Section 450.02 (2) states that the board “shall adopt rules defining the active practice of pharmacy. The rules shall apply to all applicants for licensure under s. 450.05.”

Section 450.02 (3) provides that “[t]he board may promulgate rules:

(a) Relating to the manufacture of drugs and the distribution and dispensing of prescription drugs.

(b) Establishing security standards for pharmacies.

...

(d) Necessary for the administration and enforcement of this chapter and ch. 961.

(e) Establishing minimum standards for the practice of pharmacy.”

Section 961.31 gives the Pharmacy Examining Board authority to “promulgate rules relating to the manufacture, distribution and dispensing of controlled substances within this state.”

Section 961.38 (2) states that “In emergency situations, as defined by rule of the pharmacy examining board, schedule II drugs may be dispensed upon an oral prescription of a practitioner, reduced promptly to a written hard copy or electronic record and filed by the pharmacy. Prescriptions shall be retained in conformity with rules of the pharmacy examining board promulgated under s. 961.31. No prescription for a schedule II substance may be refilled.”

Related statute or rule: N/A

Plain language analysis:

This rule project revises ch. Phar 8 to reduce regulatory burdens on pharmacies, while maintaining public safety. The rule project simplifies recordkeeping requirements for controlled substances, removes restrictions on receipt of prescriptions via facsimile machine, partial dispensing, renewals, labeling, and emergency kits in long-term care facilities.

Summary of, and comparison with, existing or proposed federal regulation:

The practice of pharmacy is not regulated by the federal government and Wisconsin has its own controlled substances schedules. However, the federal government does regulate federally controlled substances and the vast majority of Wisconsin controlled substances are also federally controlled substances. Title 21 CFR Chapter II governs federally scheduled controlled substances, including: registration of manufacturers, distributors and dispensers of controlled substances; prescriptions; orders for schedule I and II controlled substances; requirements for electronic orders and prescriptions; and disposal.

Summary of public comments received on statement of scope and a description of how and to what extent those comments and feedback were taken into account in drafting the proposed rule: N/A

Comparison with rules in adjacent states:

Illinois: Statutes outlining Illinois’ Pharmacy Practice Act are found under 225 ILCS 85 and codified under IL 68/1330 for the Pharmacy Practice. Specifically, IL 68/1330.600 to 68/1330.800 outlines requirements for pharmacy standards and pharmacy operations. Illinois law requires a pharmacist to report theft or loss of controlled substances to the board at the same time it is reported to the DEA (IL 68/1330.710). Illinois administrative rule requires that inventory of controlled substances be done annually, with an exact count for Schedule II drugs and an approximation for Schedule III and IV. Illinois also requires that a record of all written prescription orders received and verbal prescriptions filled, compounded or dispensed for controlled substances be retained for at least 5 years (IAC 3100.360). Illinois also allows a pharmacist to fill an oral prescription for a

Schedule II controlled substance where immediate administration is necessary for proper treatment, no appropriate alternative treatment is available, and it is not possible for the prescriber to provide a written prescription. There does not appear to be a requirement that the prescriber follow up with a written prescription (IAC 3100.400).

Iowa: The Iowa Pharmacy Board requires a pharmacy to maintain controlled substance records for at least 2 years and to segregate Schedule I and II drug records from other controlled substance records (Iowa Admin. Code 657-10.36). Iowa also requires that pharmacies keep a perpetual inventory of all Schedule II drugs on hand (Iowa Admin. Code 657-10.18). Iowa only requires a pharmacist to report theft or loss of controlled substances to the Pharmacy Board if there is reason to believe that the theft was committed by a pharmacy board licensee, otherwise it is sufficient to merely report to the DEA (Iowa Admin. Code 657-10.21). Iowa also allows a pharmacist to fill an oral prescription for a Schedule II controlled substance where immediate administration is necessary for proper treatment, no appropriate alternative treatment is available, and it is not possible for the prescriber to provide a written prescription. Like Wisconsin, the prescriber must provide a written prescription within 7 days (Iowa Admin. Code 657-10.26).

Michigan: Michigan requires theft or diversion of a controlled substance to be reported to the DEA within 10 days. There does not appear to be a separate requirement to report it to the Pharmacy Board (Mich. R 338.3141). Inventory must be taken of all controlled substances at least annually (Mich. R 338.3151 and 338.3152). Controlled substance records must be retained for at least 5 years, with the first 3 in hard copy form and in the last 2 may be kept electronically. Michigan also allows a pharmacist to fill an oral prescription for a Schedule II controlled substance where immediate administration is necessary for proper treatment, no appropriate alternative treatment is available, and it is not possible for the prescriber to provide a written prescription. Like Wisconsin, the prescriber must provide a written prescription within 7 days (Michigan R 338.3164 and 338.3165).

Minnesota: Minnesota requires a perpetual inventory of Schedule II substances which must be reconciled monthly (Minn. Admin. Code 6800.4600). Pharmacists must report loss or theft of controlled substances to the DEA immediately. There is no requirement that a separate report be made to the state (Minn. Admin. Code 6800.4800). All prescription information must be maintained for at least 2 years (Minn. Admin. Code 6800.3100).

Summary of factual data and analytical methodologies:

The Pharmacy Examining Board completed a comprehensive review of ch. Phar 8, Requirements for Controlled Substances, in order to identify and make revisions to ensure the chapters are statutorily compliant with state and federal law and are current with professional standards and practices. The board also evaluated ch. Phar 8 for ways to reduce the regulatory impact on pharmacies without negatively impacting public safety.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

The proposed rules were posted for a period of 14 days to solicit public comment on economic impact, including how the proposed rules may affect businesses, local government units, and individuals. No comments were received.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business:

These proposed rules do not have an economic impact on small businesses, as defined in s. 227.114 (1), Stats. The Department's Regulatory Review Coordinator may be contacted by email at Daniel.Hereth@wisconsin.gov, or by calling (608) 267-2435.

Agency contact person:

Nilajah Hardin, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, P.O. Box 8366, Madison, Wisconsin 53708-8306; phone (608) 267-7139; email at DSPSAdminRules@wisconsin.gov.

TEXT OF RULE

SECTION 1. Chapter Phar 8 is repealed and recreated to read:

**Chapter Phar 8
REQUIREMENTS FOR CONTROLLED SUBSTANCES**

Phar 8.01 Federal registration and compliance with federal, state, and local laws and regulations. (1) FEDERAL REGISTRATION REQUIRED. To possess, manufacture, distribute, dispense, or conduct research with controlled substances in this state, pharmacies and pharmacists shall register with the drug enforcement administration as required under federal law.

(2) CONTROLLED SUBSTANCES AUTHORIZATION UNDER FEDERAL REGISTRATION. As provided under s. 961.32 (1m) (a), Stats., pharmacies and pharmacists registered under federal law to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, and conduct research with those substances in this state to the extent authorized by their federal registration and in conformity with the provisions of ch. 961, Stats.

(3) COMPLIANCE WITH LAWS AND REGULATIONS. Failure to register with the drug enforcement administration or otherwise comply with applicable federal, state, and local laws and regulations relating to possessing, manufacturing, distributing, dispensing, or conducting research with controlled substances constitutes unprofessional conduct for purposes of s. 450.10, Stats.

Note: The United States Department of Justice Drug Enforcement Administration has published a pharmacist's manual, which provides an informational outline of the federal Controlled Substances Act. It can be found online at:
<https://www.deadiversion.usdoj.gov/pubs/manuals/index.html>.

(4) EMERGENCY KITS IN LONG TERM CARE FACILITIES. Nothing in these rules shall prohibit long term care facilities from obtaining an emergency kit, from a DEA registered pharmacy, in compliance with federal law.

Phar 8.02 Purpose of issue of prescription order. Prescription orders for controlled substances shall be issued for a legitimate medical purpose by individual practitioners acting in the usual course of professional practice. Responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who dispenses the prescription.

Phar 8.03 Valid prescription requirements. (1) A pharmacist may not dispense controlled substances for a prescription the pharmacist knows, or reasonably should know, is not a valid prescription under applicable federal, state, and local laws and regulations.

(2) An order purporting to be a prescription order not issued in the usual course of professional treatment or in legitimate and authorized research is not a valid prescription order within the meaning and intent of ss. 450.01 (21) and 961.38, Stats. A prescription order issued by a practitioner to obtain controlled substances for the purpose of general dispensing or administration to patients by the practitioner is not valid. A pharmacist knowingly dispensing pursuant to such a purported order, as well as the practitioner issuing it, shall be subject to the penalties provided for violation of the provision of law relating to controlled substances.

Phar 8.04 Notification of suspicious orders for and theft or loss of controlled substances. A pharmacy or pharmacist shall notify the board of a suspicious order or series of orders for controlled substances or the theft or loss of controlled substances on the same day notification is required to be provided to the drug enforcement administration. Notification to the board shall include all information required to be provided in the notification to the drug enforcement administration.

Phar 8.05 Recordkeeping. (1) Records shall be maintained as required by the federal controlled substances act, ch. 961, Stats., and s. 450.11 (2), Stats.

(2) The managing pharmacist shall oversee quarterly inspections, maintenance, and reconciliation of all controlled substances, including maintaining a perpetual inventory for all Schedule II controlled substances.

Phar 8.06 Identification card requirement under s. 450.11 (1b), Stats. (1)

DEFINITION. In this section and s. 450.11 (1b) (e) 3., Stats., “health care facility” means a facility, as defined in s. 647.01 (4), Stats.; any hospital, nursing home, community-based residential facility, county home, county infirmary, county hospital, county mental health complex, or other place licensed or approved by the department of health services under s. 49.70, 49.71, 49.72, 50.03, 50.032, 50.033, 50.034, 50.35, 51.08, or 51.09, Stats.; a facility under s. 45.50, 51.05, 51.06, 233.40, 233.41, 233.42, or 252.10, Stats.; and a hospice facility under s. 50.90 (1) (c), Stats.

(2) EXEMPTION. There shall be an exemption to the requirement for an identification card when the drug is lawfully delivered to the patient’s home, or any address requested by the patient, through mail, common carrier or delivery service. A valid signature is required upon delivery.

Phar 8.07 Partial Dispensing. (1) A pharmacist may partially dispense a prescription containing a controlled substance listed in schedule III, IV and V.

(2) The partial dispensing of a prescription containing a controlled substance listed in schedule II is permissible, if one of the following conditions applies:

(a) If the pharmacist is unable to supply the full quantity called for in a written, electronic, or emergency oral prescription order, and the pharmacist makes a notation of the quantity supplied on the face of the written hard copy prescription order or written record of the electronic or emergency oral prescription order.

(b) If the patient requests partial dispensing.

(c) If the prescribing practitioner requests partial dispensing.

The remaining portion of any partially dispensed prescription under this section may be dispensed within 72 hours of the first partial dispensing. If the remaining portion is not dispensed within the 72 hour period, the pharmacist shall so notify the prescribing individual practitioner. No further quantity may be supplied beyond the 72 hours without a new prescription order.

(3) Prescription orders for schedule II controlled substances written for patients in long term care facilities (LTCF) or for patients with a medical diagnosis documenting a terminal illness may be dispensed in partial quantities to include individual dosage units. The prescribing practitioner may document a terminal illness by writing upon the face of the prescription order the phrase “terminal illness” or words of similar meaning. If there is any question whether a patient may be classified as having a terminal illness, the pharmacist shall contact the prescribing practitioner prior to partially dispensing the prescription. Documentation of a terminal illness, whether substantiated by the presence of an appropriate phrase written upon the face of the prescription order or through pharmacist contact with the prescribing practitioner, shall be placed within the individual medication profile record maintained under s. Phar 7.07. The pharmacist shall record on the prescription order whether the patient is “terminally ill” or an “LTCF patient.” A prescription order that is partially dispensed and does not contain the notation “terminally ill” or “LTCF patient” shall be deemed to have been dispensed in violation of this section. For each partial dispensing, the dispensing pharmacist shall record on the back of the prescription order or on another appropriate record, uniformly maintained and readily retrievable, the date of the partial dispensing, quantity dispensed, remaining quantity authorized to be dispensed and the identification of the dispensing pharmacist. Subsequent partial dispensing is not permitted under this section if the patient becomes

deceased, or is no longer diagnosed as terminally ill, or no longer resides within an LTCF. The total quantity of a schedule II controlled substance dispensed by partial dispensing may not exceed the total quantity prescribed. Prescription orders for schedule II controlled substances for patients in an LTCF or patients with a medical diagnosis documenting a terminal illness shall be valid for a period not to exceed 60 days from the issue date unless terminated earlier by the discontinuance of medication.

(4) Information pertaining to current prescription orders for schedule II controlled substances for patients in an LTCF or for patients with a medical diagnosis documenting a terminal illness may be maintained in a computerized system if the system has the capability to permit:

(a) Display or printout of: the original prescription order designation; date of issue; identification of prescribing practitioner; identification of patient; name and address of the LTCF or name and address of the hospital or residence of the patient; identification of medication authorized, including dosage form, strength and quantity; listing of partial quantities that have been dispensed under each prescription order and the information required in sub. (3).

(b) Immediate (real time) updating of the prescription order record each time there is partial dispensing of the prescription.

(c) Retrieval of partially dispensed schedule II prescription information identical to that required by s. Phar 7.05 (2) for all prescription renewal information.

Phar 8.08 Controlled substances in emergency kits for long term care facilities. Long term care facilities which are not registered with the DEA shall meet all of the following requirements regarding emergency kits containing controlled substances:

(1) The source of supply must be a DEA registered hospital, pharmacy or practitioner.

(2) The pharmaceutical services committee of the facility shall establish security safeguards for each emergency kit stored in the LTCF which shall include the designation of individuals who may have access to the emergency kits and a specific limitation of the type and quantity of controlled substances permitted to be placed in each emergency kit.

(3) A pharmacist shall be responsible for proper control and accountability for such emergency kits within the LTCF which includes the requirement that the LTCF and the providing DEA registered hospital, pharmacy or practitioner maintain complete and accurate records of the controlled substances placed in the emergency kits, the disposition of those controlled substances, plus the requirement to take at least monthly physical inventories.

(4) The pharmaceutical services committee will establish the emergency medical conditions under which the controlled substances may be administered to patients in the LTCF which shall include the requirement that medication be administered by authorized personnel only as expressly authorized by an individual DEA registered practitioner and in compliance with all applicable federal and state laws.

(5) Noncompliance with this rule may result in revocation, denial or suspension of the privilege of having or placing emergency kits, containing controlled substances, in LTCF.

SECTION 2. EFFECTIVE DATE. The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, pursuant to s. 227.22 (2) (intro.), Stats.

(END OF TEXT OF RULE)

Dated 07/18/2022

Agency 

Chairperson
Pharmacy Examining Board