



MONTANA
ADMINISTRATIVE
REGISTER



DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF ADOPTION

MAR NOTICE NO. 2025-280.2

Summary

Amendment of ARM 37.40.1013 pertaining to Community First Choice Provider Enrollment

Previous Notice(s) and Hearing Information

On February 21, 2025, the Department of Public Health and Human Services published MAR Notice No. 2025-280.1 pertaining to the public hearing on the proposed amendment of the above-stated rule in the 2025 Montana Administrative Register, Issue Number 4.

A hearing was held on March 14, 2025.

Final Rulemaking Action – Effective July 26, 2025

AMEND AS PROPOSED

The agency has amended the following rule as proposed:

**37.40.1013 AGENCY-BASED AND SELF-DIRECTED COMMUNITY FIRST CHOICE SERVICES:
PROVIDER ENROLLMENT**

Statement of Reasons

The agency has considered the comments and testimony received. A summary of the comments received, and the agency's responses are as follows:

Comment #1: A commenter suggested the department revise Electronic Visit Verification (EVV) requirements for live-in caregivers to allow for an exemption or waiver from using EVV for good

cause shown to account for circumstances in which Internet access or cellular service is unavailable or the member is unable to afford such services. The commenter referenced the circumstances of a member residing in a rural area where Internet access and cellular service is unavailable and indicated the rule as proposed will result in a loss of services for this member provided through a live-in caregiver.

Response #1: The department recognizes the challenges of EVV use for members residing in rural areas of the state that lack reliable Internet access and cellular service as well as affordability issues that can exist for such services. The department believes these challenges can be addressed through means short of establishing an exemption or waiver to compliance with EVV. As part of implementing EVV, the department initially planned to make available an Interactive Voice Response (IVR) option for a period of up to 90 days. IVR is a system that allows caregivers to comply with EVV requirements through use of a landline telephone without the need for cellular service, Internet access, or a smart device. In response to the concerns raised by the commenter, the department is making IVR available as an option for members who lack Internet access or cellular service or are unable to afford such services. Members may request to use IVR by completing the IVR request form located at: <https://mt.accessgov.com/dphhs/Forms/Page/evv/electronicvisitverification/>. Approved requests for IVR will remain valid indefinitely, but are subject to periodic review by the department to ensure they continue to meet approval criteria. This process is intended to ensure that all members have the ability to comply with EVV and that implementation of EVV will not result in the loss of member services.

Comment #2: A commenter indicated the proposal to mandate use of EVV for live-in caregivers, as applied to members who have no cellular service or Internet access, is unlawful under the Americans with Disabilities Act (ADA) and *Olmstead v. L.C.*, 527 U.S. 581 (1999), because it creates an inability for members to comply with EVV, which will result in the loss of caregiver services and unjustified institutionalization of members.

Response #2: Please see the response to Comment #1. The department also considers requests for a reasonable accommodation on an individualized basis consistent with the requirements of the ADA.

Comment #3: A commenter indicated the proposal to mandate use of EVV for live-in caregivers, as applied to members who have no cellular service or Internet access, violates due process because it creates an inability for members to comply with EVV and will result in the loss of caregiver services.

Response #3: Please see the response to Comment #1. Additionally, the department has due process protections in place arising from any decision it makes to terminate a member's services under which the member receives written notice of the decision, a statement of the reasons for the decision, and the opportunity to contest the decision through an administrative hearing. See ARM 37.5.505 and 37.5.307.

Comment #4: A commenter indicated the proposal to mandate use of EVV for live-in caregivers, as applied to members who have no cellular service or Internet access, amounts to an excessive fine in violation of the Eighth Amendment of the United States Constitution because it will lead to a loss of caregiver services for members.

Response #4: The department disagrees. The proposed rule does not involve the imposition of any fine. Please see the response to Comment #1 regarding concerns about the ability to meet EVV requirements in cases of lack of Internet access or cellular service.

Comment #5: A commenter indicated that controlling case law from the Ninth Circuit Court of Appeals requires that employers reimburse an employee for the cost of using their personal cellular phone in the course of the employee's job duties. The commenter references *Kemper v. West Business Solutions, LLC* (2018), but did not include the case citation.

Response #5: The department is unable to locate a case from the Ninth Circuit Court of Appeals with the caption identified by the commenter. Based upon the commenter's description of the holding, the department has determined that the case cited by the commenter, *Kemper v. West Business Solutions, LLC* (2018), is inapplicable to the proposed rule given that the department is not an employer of members receiving Community First Choice Services and Personal Care Services or of the caregivers providing these services.

Comment #6: A commenter indicated that the Netsmart EVV application cannot be used to capture visits if there is no cellular or Internet access.

Response #6: The Netsmart application, once installed on a smart device, allows visits to be captured in offline mode and to be uploaded once the device is connected to cellular or Internet service.

Comment #7: A commenter indicated the federal statutory authority referenced in the proposed rulemaking does not support the proposed rule because the statute does not set forth the elements required to be captured by an EVV system. The commenter indicated the statute instead provides that "the regulations must ensure that this payment prohibition does not result in a loss of access to care or services for Medicaid beneficiaries."

Response #7: The department disagrees. The proposed rulemaking references 42 U.S.C. 1396b(l), which does set forth the elements required to be captured under an EVV system. The commenter may be referring to 42 U.S.C. 1396b-1, which governs payment adjustment for health care acquired conditions and is inapplicable to this rulemaking. Additionally, the department does not believe that implementation of EVV will result in a loss of access to Community First Choice Services and Personal Care Services, particularly given the availability of the option of using a landline through IVR to meet EVV requirements.

Commenter #8: A commenter indicated the authorizing statute cited in support of the rulemaking (53-2-201, MCA) does not support the rule because applying EVV to live-in caregivers is inconsistent with federal law.

Response #8: The department agrees that rules adopted under this statute must be consistent with federal law, but disagrees the proposed rule is inconsistent with federal law. Please see the statement of reasonable necessity, which details why applying EVV to live-in caregivers is not inconsistent with federal law and aligns with Centers for Medicare & Medicaid Services guidance.

Comment #9: A commenter indicated that the implementing statutes cited in support of the rulemaking (53-2-201 and 53-6-113, MCA) do not support the rule because EVV is not required by federal law for live-in caregivers and imposing such a requirement is inconsistent with federal law.

Response #9: The department agrees that EVV is not required by federal law for live-in caregivers, but disagrees that establishing such a requirement is inconsistent with federal law. States are not prohibited from applying EVV to live-in caregivers under federal law. As set forth in the statement of reasonable necessity, Centers for Medicare & Medicaid Services guidance specifically provides that states may choose to implement EVV to live-in caregiver services, particularly when using discrete units of reimbursement. In Montana, Community First Choice Services and Personal Care Services providers are paid in discrete units of reimbursement of 15-minute increments. Applying EVV to live-in caregivers is not inconsistent with federal law.

Comment #10: A commenter questioned the stated need of the rule to control fraud, waste, and abuse and how applying to EVV to live-in caregivers will prevent fraud, waste, and abuse.

Response #10: Please see paragraph four of the statement of reasonable necessity in the proposal notice, which explains how EVV will help combat fraud, waste, and abuse for all members utilizing Community First Choice Services and Personal Care Services, including members who receive services through a live-in caregiver.

Comment #11: A commenter questioned the department's conclusion that the proposed rulemaking is anticipated to have no fiscal impact. The commenter indicated the rule will have a highly negative and significant fiscal impact on members who lack cellular or Internet service and will not be able to continue to receive Community First Choice Services or Personal Care Services if EVV is applied to live-care givers.

Response #11: The fiscal impact section of the proposal notice addresses the anticipated fiscal impact to the department. Please see the response to Comment #1 regarding the concern that implementation of EVV will cause a significant fiscal impact to members without cellular or Internet service by leading to a loss of services for members.

Comment #12: A commenter indicated the proposed rule is incompatible with the department's stated mission to serve Montanans in their communities to improve health, safety, well-being, and empower independence because implementation of EVV will lead to a loss of live-in caregiver services for members who do not have cellular or Internet access.

Response #12: Please see the response to Comment #1.

Comment #13: A commenter indicated that mandating the use of EVV is inconsistent with the requirement for Community First Choice Services and Personal Care Services to utilize a person-centered planning process.

Response #13: The department disagrees. The person-centered planning process focuses on identification of the types of services the member desires to receive and service provider choice. See ARM 37.40.1001(19) and 37.40.1110(17). EVV is a system that captures certain data elements relating to services that are provided. It does not mandate that a member receive particular services or require that services be provided through a particular provider.

Contact

Bailey Yuhas
(406) 329-7913
hhsadminrules@mt.gov
Fax: (406) 444-9744

Rule Reviewer

Robert Lishman

Approval

Charles T. Brereton, Director
Department of Public Health and Human Services