

FINDING OF EMERGENCY

The Department is concerned with the general well being of all Californians. Included in that concern is the fiscal well being of the state, through which each resident of the state receives invaluable programs and assistance such as the Medi-Cal program. In its efforts to strengthen the amount of revenue flowing into the State General Fund, the Department pursues the recovery of Medi-Cal expenditures from the estates of deceased Medi-Cal beneficiaries. The transfer of beneficiaries' assets into annuities has hampered these efforts and resulted in abuse of the Medi-Cal and Medicaid programs through unsound fiscal practices in the form expenditures by these programs for services that are not being repaid upon the Medi-Cal beneficiary's death. Therefore, these regulations are a protective measure to strengthen the Department's ability to avoid the abuse caused by not seeking recovery from annuities contained in deceased Medi-Cal beneficiaries' estates. Not seeking to recover from annuities is a policy that is inconsistent with sound fiscal practices.

Existing federal law, Title 42, U.S.C., section 1396p(b), and state law, Welfare & Institutions Code section 14009.5, requires the Department to seek reimbursement from the estates of deceased Medi-Cal beneficiaries for certain Medi-Cal paid services provided on or after the individual's 55th birthday, unless specific exemptions or other limitations apply. This regulatory change will further the Department's compliance with these federal and state law mandates by creating an additional source of recoverable funds. In addition, this amendment will fulfill the Department's compliance, in part, with a recent settlement agreement and permanent injunction in the case of *California Advocates for Nursing Home Reform et al. v. Diana M. Bonta, et al.* (2003) 106 Cal.App. 4th 498, which requires the Department to amend current regulations to specify annuities as an asset in the definition of "estate" and remove the term "other arrangement".

Welfare & Institutions Code section 14043.75 authorizes the Director of the Department to adopt, repeal, or amend regulations on an emergency basis, in order to prevent or curtail fraud and abuse. Emergency regulations adopted, amended, or repealed pursuant to this section are exempt from review by the Office of Administrative Law. The emergency regulations authorized by this section shall be submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations.

Welfare & Institutions Code section 14043.1 defines "abuse" as practices that are inconsistent with sound fiscal or business practices and result in unnecessary cost to the federal Medicaid and Medi-Cal programs. Assets sheltered from estate recovery in annuities is a form of abuse of the Medi-Cal program, because

Medi-Cal funds are being depleted while the beneficiary's heirs' inheritance is protected from recovery. This is not a sound fiscal practice and needs to be corrected on an emergency basis to avoid this continuing abuse of federal and state economic reserves.

The regulation change is deemed an emergency to protect the general welfare of the public, through avoiding unnecessary losses of recoverable expenditures for Medi-Cal benefits and services and thereby providing additional funds for needy Californians.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW: Welfare and Institutions (W&I) Code sections 10725 and 14124.5 authorizes the director of the Department of Health Services (Department) to adopt, amend, or repeal regulations as necessary and proper to carry out the purposes and intent of the statutes governing the Medi-Cal Program.

Existing federal law, Title 42, U.S.C., section 1396p, and state law, W&I Code section 14009.5, requires the Department to seek reimbursement from the estates of deceased Medi-Cal beneficiaries for certain Medi-Cal paid services provided on or after the individual's 55th birthday, unless specific exemptions or other limitations apply. An estate is defined as those assets owned by the Medi-Cal beneficiary at the time of death, including assets distributed through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. The Department's estate recovery (ER) claims include nursing facility services, home and community-based services, and related hospital and prescription drug services. Federal law also allows states to recover for other services as specified under their State Plan. In California, these include all payments for health care premiums and services provided to Medi-Cal beneficiaries after their 55th birthday. The Department's claim against the estate of a deceased Medi-Cal beneficiary is limited to the value of the decedent's assets or the amount of the medical services paid by Medi-Cal, whichever is less.

In 1993, the State adopted Title 22, California Code of Regulations (CCR), sections 50960-50964, to implement, interpret and make specific the state and federal laws governing the ER activities for the Medi-Cal Program. Sections 50960-50964 specifically address ER activities related to: definitions, estate claims, notification, undue hardship criteria, and estate hearings.

Attorneys, estate and financial planners, as well as insurance agents are informing elderly Californians that when investing their assets into annuities, the annuities would forever be protected from estate recovery. However, the Centers for Medicare and Medicaid Services has clarified that states, such as California, which have adopted the expanded definition of "estate", may recover from annuities once annuities are specified in the definition and promulgated

under the regulatory process. This emergency regulatory action provides clarification regarding the Department's authority to recover from annuities by specifying annuities in the definition of estate, but will only affect annuities purchased on or after September 1, 2004. In addition, this amendment fulfills the Department's compliance, in part, with a recent settlement agreement and permanent injunction in the case of *California Advocates for Nursing Home Reform et al. v. Diana M. Bontá, et al.* (2003) 106 Cal. App. 4th 498, which requires the Department to amend regulations to specify annuities as an asset in the definition of "estate" and remove the term "other arrangement."

This emergency regulatory action amends Title 22, CCR, sections 50960 and 59061, and specifically accomplishes the following:

1. Specifies annuities in the definition of "Estate" as an asset from which the Department may seek recovery for Medi-Cal expenditures, and removes the term "other arrangement".
2. Adds the definition of "Annuity" to the regulations for clarification purposes, and specifies that only annuities purchased on or after September 1, 2004 are affected by this emergency action; and amends the definition of "Applicant" for clarification purposes.
3. Specifies how the Department's claim for reimbursement of Medi-Cal expenditures shall be recovered from an annuity as part of a deceased beneficiary's estate.
4. Provides clarity and enables the Department to consistently administer and implement the estate recovery mandates of state and federal law.

AUTHORITY: Sections 10725, 14043.75, and 14124.5, Welfare and Institutions Code.

REFERENCE: Section 1396p(b), 42 USC; Section 14009.5, Welfare and Institutions Code; *Belshé v. Hope* (1995) 33 Cal. App. 4th 161, and *California Advocates for Nursing Home Reform v. Bontá* (2003) 106 Cal. App. 4th 498.

FISCAL IMPACT ESTIMATE:

- A. Fiscal Effect on Local Government: None
- B. Fiscal Effect on State Government: A minimal savings to the state of approximately \$62,500 in fiscal year 2004-2005 is anticipated as a result of the Department clarifying its collection rights against certain estate assets, specifically annuities.

- C. Fiscal Effect on Federal Funding of State Programs: A minimal savings of approximately \$62,500 in fiscal year 2004-2005 is anticipated on matching federal funds that are a direct savings to the federal government.
- D. All cost impacts, known to the Department at the time the notice of emergency action was submitted to the Office of Administrative Law, that a representative private person or business would necessarily incur in reasonable compliance with the emergency action: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the emergency action.
- E. Other Nondiscretionary Cost or Savings Imposed on Local Agencies:
None

DETERMINATIONS: The Department has determined that the regulations would not impose a mandate on local agencies or school districts, nor are there any costs for which reimbursement is required by Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

The Department has made an initial determination that the regulations would not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The Department has determined that the regulations would not significantly affect the following:

- (1) The creation or elimination of jobs within the State of California.
- (2) The creation of new businesses or the elimination of existing businesses within the State of California.
- (3) The expansion of businesses currently doing business within the State of California.

The Department has determined that the regulations may have a minimal affect on small business that provide financial and estate planning services. However, the majority of annuities are issued by financial institutions (such as banks, trusts, savings and loan associations, etc.), which are excluded by Government Code 11341.610 from the definition of small business.

The Department has determined that the regulations will have no impact on housing costs.