

DRA Implementation in California as of 2/08

DRA Provision	Current California Law	Proposed language in California
<p>Look-Back Period/Transfer of Assets</p> <p>Increases the look-back period to 60 months and requires states to begin periods of ineligibility in either the month of application or the first day of the month during or after which assets were transferred by an eligible Medicaid beneficiary when they begin receiving those services. Requires that the state develop a hardship waiver process. Periods of ineligibility cannot be imposed when undue hardship exists.</p> <p>Permits the nursing facility to request consideration of undue hardship for their patients upon approval of the personal representative, if any.</p>	<p>California uses a 30-month look back period, and the period of ineligibility begins from the month of the date of the transfer.</p> <p>California currently has undue hardship provisions under draft regulations 22 CCR §50096.5 where the applicant has an opportunity to appeal a denial of benefits based on a transfer of assets.</p>	<p>W&I Code § 14015 as amended would implement this pursuant to federal law and pursuant to the adoption of non-emergency regulations.</p> <p>Regulations will likely phase in the new look back period, e.g., 1/09=30 months, 2/09=31 months, etc., until the five-year look back is reached. Need for full regulatory process for new look-back, transfer rules and undue hardship criteria.</p> <p>The new rules will not be applied retroactively, i.e., to transfers made on or before the date the final regulations are filed with the Secretary of State.</p> <p>Hardship Provisions:</p> <p>Section 14015.1 includes the hardship provisions that must be considered when an applicant or recipient would otherwise be subject to a period of ineligibility because of a transfer of assets; includes the notice, process and opportunity for appeal requirements.</p> <p>Section 14015.2: authorizes the nursing home to act on behalf of the beneficiary and to authorize the facility to request “bed hold” payments for up to 30 days while the undue hardship process is underway.</p> <p>Non-emergency regulations will have to be promulgated and filed with the Secretary of State before implemented.</p>

<p>Treatment of Annuities</p> <p>The new federal laws regarding annuities are substantial and comprehensive. In short, the new annuity rules:</p> <p>(a) Mandate that the states require that applicants disclose any interest that the individual or the community spouse has in an annuity, regardless of whether the annuity is irrevocable or is treated as an asset.</p> <p>(b) Require that the application or recertification form include a statement that the State becomes a remainder beneficiary under the annuity because of the provision of medical assistance.</p> <p>(c) Treat the purchase of a deferred or balloon payment annuity as a transfer of assets.</p> <p>(d) Exempts work related pension funds, annuities and IRAs from the annuity rules if established under certain IRS rules.</p>	<p>Current California law requires applicant and spouse to disclose any interest in an annuity.</p> <p>Under current California law, the principle in an annuity is considered "unavailable" for the purposes of Medi-Cal eligibility as long as the annuity is structured to pay out fixed, equal payments over the actuarial life of the beneficiary. Despite the requirement of fixed, equal payments, "balloon" payment annuities have been common, since no penalty attaches. Any income from the annuity is counted toward the share of cost.</p> <p>Under California regulations filed in 2004, annuities purchased on or after September 1, 2004 are subject to Medi-Cal recovery.</p> <p>Work related pensions and annuities are considered "unavailable" if the beneficiary receives periodic payments of interest and principal and exempt for the community spouse.</p>	<p>Section 14002 (f) defines 'annuity'</p> <p>Section 14006.41 requires applicants to disclose any interest the applicant or applicant's spouse has in an annuity and requires the Department to inform applicant and beneficiaries that the state will become a remainder beneficiary in certain annuities.</p> <p>Section 14009.6 specifies those annuities owned by an individual or an individual's spouse in which the state may become a remainder beneficiary; defines transactions that are subject to these rules; specifies the notice process to the issuer.</p> <p>Section 14009.7 specifies those annuities that are exempt from the DRA requirements, including annuities purchased with the community spouse's CSRA, work-related pension annuities, and annuities that are irrevocable and non-assignable, actuarially sound, and that provide for fixed, equal payments over the term of the annuity, with no deferral and no balloon payments.</p> <p>Non-emergency regulations will have to be promulgated and filed with the Secretary of State before implemented.</p>

<p>Income First</p> <p>Under the new federal "income first" rule, states are required to allocate any available income from the nursing home spouse first, before any additional assets will be allocated.</p> <p>It is important to note that the DRA did not modify or change sections 42 USC 1396r-5(d)(5) or (f)(3) pertaining to court-ordered increases in the community spouse monthly allocation or transfers under court orders.</p> <p>Thus, the income-first rule only applies to Fair Hearing increases in the MMMNA.</p>	<p>Under current California law, if the community spouse's minimum monthly maintenance need allowance (MMMNA) is below the income cap (\$2,541 for 2007), he/she can apply for a fair hearing or court order to retain assets over the Community Spouse Resource Allowance (CSRA) level - if they have excess assets - because they are needed to generate income.</p> <p>This means that an at-home spouse whose income is, for example, only \$500 per month, can often retain assets well above the \$101,640 level, before looking to retain any of the nursing home spouse's income. This is the most preferred way to ensure that the community spouse can be somewhat financially secure, since after the nursing home spouse dies, much of the income dies with the spouse.</p>	<p>Although ACWDL 06-12 implements the "income first" rule for CSRA increases pursuant to Fair Hearing requests, these instructions apply only to Administrative Law Judges. They do not impact 3100 petition court-ordered increases in the CSRA or spousal allocation, which will still be honored.</p> <p>The proposed language does not address the "income first" issue, and court ordered increases in the CSRA and spousal allocation will still be available.</p>
<p>Home Equity Rules</p> <p>Disqualification for Long Term Care Assistance when home equity exceeds \$500,000, unless there is a spouse or a minor, blind or disabled child lawfully residing in the home.</p> <ul style="list-style-type: none"> • Applies to nursing home as well as "other long-term care services" • States can elect to increase that amount up to \$750,000 • Dollar amounts shall increase, beginning 2011, based on CPI • Individuals can use reverse mortgages or home equity loans to reduce equity • Disqualification can be waived in case of demonstrated hardship and requires the Secretary to establish hardship waiver criteria for those impacted by the statute. <p><i>Effective date: Shall apply to individuals who apply on or after January 1, 2006</i></p>	<p>No home equity limitations under current law.</p>	<p>Section 14006.15 increases the equity limit to \$750,000; defines "equity interest" as the lower of the assessed value or the appraised value, minus encumbrances, and provides for an increase in the equity limit effective 2011 based on the consumer price index.</p> <p><u>This section does not apply if:</u></p> <ul style="list-style-type: none"> • the individual's spouse, minor, blind or disabled children is/are living in the home: • the individual was eligible for or receiving home and facility care prior to 1/1/06; • denial of eligibility would result in a demonstrated hardship. <p>The hardship criteria is relatively detailed and includes: "if the individual was determined eligible based on an application filed on or after January 1, 2006, but before the implementing regulations were filed with the Secretary of State."</p> <p>Thus, this provision will not be retroactively applied to post 1/1/06 applicants.</p>

<p>Partial Months of Ineligibility</p> <p><i>Requires</i> states to impose partial months of ineligibility when amounts under the APPR are transferred.</p> <p>Rounding down to the nearest whole number will not longer be permitted.</p>	<p>No period of ineligibility applies when the amount transferred is less than the APPR.</p> <p>California currently rounds down to the nearest whole number and does not count partial months of ineligibility.</p>	<p>Sections 14015 and 14018 of the W&I Code would be amended to include partial months of ineligibility.</p>
<p>Aggregate Total Value of Transfers Transfer of a Home</p> <p><i>The DRA permits</i> the states to aggregate all transfers made during the look back period and treat them as one transfer to determine the period of ineligibility to begin on the earliest date, i.e., the date of application.</p>	<p>Under current law, California does not aggregate transfers, but treats each transfer as a separate transfer and the periods of ineligibility can run concurrently.</p> <p>Current law also permits the transfer of a home as an exempt asset to persons other than those listed as exempt transferees.</p>	<p>Section 14015 (a) includes language that the manner in which the transfer of assets results in periods of ineligibility will be "applied in accordance with federal law." Because the federal law in this area allows the states great flexibility, regulations will be needed to determine the manner in which periods of ineligibility will be applied.</p> <p>Section 14015(b) retains the current language: "...a satisfactory showing that assets transferred exclusively for a purpose other than to qualify for medical assistance shall not result in ineligibility for Medi-Cal and shall include, but not be limited to, the following: (1) Property that would have been considered exempt for purposes of establishing eligibility pursuant to federal or state laws at the time of the transfer. <u>(Currently, this includes an exempt principal residence, and the proposed language does not change this.)</u></p> <p>Non-emergency regulations will have to be promulgated and filed with the Secretary of State before any new provisions are implemented.</p>

<p>Notes and Loans</p> <p>Funds used to purchase a promissory note, loan or mortgage will be considered an "asset" for the purposes of the transfer of asset rules, unless the note, loan or mortgage</p> <ul style="list-style-type: none"> • has a repayment term that is actuarially sound; • provides for payments in equal amounts during the term of the loan, with no deferral or balloon payments; • prohibits the cancellation of the balance upon the death of the lender. <p>If the note, loan or mortgage does not meet these requirements, its value will be defined as the outstanding balance due as of the date of application for Medicaid.</p>	<p>Currently under California law, there is no requirement that payments be made on a monthly basis and if made unpredictably, they could avoid being included in the share of cost calculation due to the 10-day notice requirement to increase the share of cost.</p>	<p>Proposed amendments to W&I Code section 14015 incorporate this provision, and regulations will also have to be promulgated and filed with the Secretary of State before implemented.</p>
<p>Transfers to Purchase Life Estates</p> <p>The purchase of a life estate in another individual's home will now be treated as a transfer of assets, unless the purchaser resides in the home for at least a year after the date of purchase.</p>	<p>California currently only penalizes transfers to purchase life estates when the transfer results in an item of lesser fair market value, except for the purchase of a life estate that is to be the home since it is a spend down on an exempt item</p>	<p>Proposed amendments to W&I Code section 14015 incorporate this provision, and regulations will need to be promulgated and filed with the Secretary of State before implemented.</p>

<p>Continuing Care/Life Care Contract Admission Fees</p> <p>Permits Continuing Care Contract Communities to include in their admission agreements a requirement that residents spend admission or entrance fees before applying for medical assistance.</p> <p>CMS guidelines define when an entrance fee paid to a CCRC or a life care community would be treated as a resource for the purposes of determining eligibility.</p>	<p>California does not currently count admission fees or entrance fees as a resource.</p>	<p>Section 14006.01 includes admission fees as a resource only if <u>all</u> of the conditions specified in the CMS guidelines exist:</p> <ul style="list-style-type: none"> • The fee can be used to pay for care under the terms of the admission agreement; and • The individual is eligible for a refund of any remaining admission fee if the individual dies or terminates the contract and leaves the community; and • The admission fee does not confer an ownership interest in the CCRC or life care community.
		<p>Section 789.8 of the Insurance Code (the notice requirements for life agents who sell annuities and other financial products) is also amended to apply these protections to "aged, blind or disabled," rather than just to "elders."</p>

Note: This side-by-side explains the proposed statutory provisions from the Department to implement the Medicaid provisions of the DRA. Over the 2008 legislative session, SB 483 (Kuehl) will likely be the vehicle to implement these provisions. Once the legislation is signed into law, the DHCS will be promulgating regulations. It is very important that advocates and estate planners pay special attention to these and make sure their voices are heard. We are particularly concerned about retaining the language regarding value of the home equity, hardship criteria, transfer of the home and transfer of asset provisions.

It is also important to note that none of these provisions will be implemented in California until the non-emergency regulations are promulgated in accordance with the Administrative Procedures Act and filed with the Secretary of State. **This will take some time, so implementation is not expected until after 2009.**