Atlantic Corporate Center
2317 Route 34, Suite 2B
Manasquan, NJ 08726
732-201-4133
CHIEF EXECUTIVE OFFICER: Thomas B. Considine

National Council of Insurance Legislators (NCOIL)

Model Workers' Compensation Drug Formulary Act

Sponsored by Rep. Matt Lehman (IN) – NCOIL Vice President

Discussion Draft as of June 11th, 2019. To be discussed during the Workers' Compensation Insurance Committee on July 11th, 2019.

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Section 1. Short Title

This Act shall be known as the "Model Workers' Compensation Drug Formulary Act"

Section 2. Purpose

The purpose of this Act shall be to require the establishment of a drug formulary for use in a state's workers' compensation system in order to facilitate the safe and appropriate use of prescription drugs in the treatment of work-related injury and occupational disease.

Section 3. Selection or Development of Drug Formulary

(A) It is the intent of the Legislature that the [insert appropriate state agency/department] select a nationally recognized, evidence-based drug formulary, for use in the workers' compensation system, or to develop such a formulary, by rule. Such formulary shall apply to prescription drugs that are prescribed and dispensed for outpatient use in connection with workers' compensation

claims with a date of injury on or after [insert date]. The drug formulary shall not apply to care provided in an emergency department or inpatient setting.

(B) In developing by rule or selecting a nationally recognized, evidence-based drug formulary for adoption, the [department] shall consider the following factors:

(1) Whether the formulary focuses on medical treatment specific to workers' compensation.

(2) Whether the basis for the formulary is readily apparent and publicly available.

(3) Whether the formulary includes measures to aid in management of opioid medications.

(4) The cost of implementation and post-implementation associated costs of the formulary.

(5) Evidence-based guidelines for the treatment of workplace injury and disease.

(6) Preferential use of generic or generic-equivalent drugs in the formulary pursuant to evidence-based practices, with consideration being given to the use of brand name medication only when its use is cost-effective, medically necessary, and evidence-based or when there is no therapeutic generic equivalent available.

(7) Inclusion of drugs that are prescribed based on medical treatment guidelines, clinical appropriateness, and injury relatedness.

Drafting Note: In some states existing statute or regulations provide for medical treatment guidelines, in such instances the formulary should complement existing guidelines.

~~(4)~~(8) Convening stakeholders from various sectors of industry, including but not limited to representatives from the following groups: Medical Providers, Pharmacy Benefit Managers, Pharmacies, Self-Insured Employers, and Labor Unions.

(C) The department, by rule, shall develop a timely and responsive dispute resolution process for disputes related to use of the formulary.

(D) Drugs that are not preferred on the formulary shall be subject to preauthorization.

Drafting Note: When adopting or developing a formulary states have considered the following as drugs that require preauthorization: (1) Compounds; (2) Brand name drugs with a generic equivalent; (3) Physician dispensed; (4) Off-label; and (5) those drugs that are unlisted.

Preauthorization should not apply to care provided in the following instances: (1) During a medical emergency; (2) In a facility-based setting; or (3) In an outpatient setting, when drugs are administered by a physician.

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~~(C)~~(E) Within [thirty (30)] days of the effective date of this Act, the [department] shall solicit public comments regarding the selection of a nationally recognized, evidence- based prescription drug formulary under this section. The public comment period shall be [ninety (90) days]. During the public comment period, the [department] shall conduct at least one public hearing on the selection of a drug formulary. The [department] shall publish notice of the public comment period and public hearings on its website. The public hearing shall include, but not be limited to, employers, insurers, private sector employee representatives, public sector employee representatives, treating physicians actively practicing medicine, pharmacists, pharmacy benefit managers, attorneys who represent applicants, and injured workers.

~~(D)~~(F) Commencing [insert date], and concluding with the implementation of the formulary, the [administrative director] shall publish at least two interim reports on the internet web site of the [division of workers' compensation] describing the status of the selection of the formulary.

~~(E)~~(G) The [department] shall [annually] review updates issued by the formulary publisher to the selected formulary.

~~(F)~~(H) The [department] shall ensure that the current nationally recognized, evidence-based prescription drug formulary is available through its publicly accessible Internet website for reference by physicians and the general public.

Section 4. Operation of Formulary

(A) Beginning [insert date] reimbursement is not permitted for a claim for payment of a drug that:

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(1) is prescribed for use by an employee who files a notice of injury under this Act; and

(2) is included but not recommended in the formulary, unless the employee begins use of such drug after [insert date], and the use continues after [insert date].

(3) if the employee begins use of the such drug before [insert date], and the use continues after [insert date], reimbursement is permitted for such drug until [insert date].

(B) If a prescribing physician submits to an employer a request to permit use of a drug that is included but not recommended in the formulary including the prescribing physician's reason for requesting use of such drug and the employer approves the request, the prescribing physician may prescribe such drug for use by the injured employee.

(C) If the employer does not approve the prescribing physician's request under subsection (B) to permit use of a drug that is included but not recommended in the formulary, the employer shall:

(1) send the request to a third party that is certified by the [Utilization Review Accreditation Commission (URAC) or another Accreditation Organization] to make a determination concerning the request; and

(2) notify the prescribing physician and the injured employee of the third party's determination not more than [five (5)] business days after receiving the request.

(D) If an employer fails to provide the notice required by subsection (C)(2), the prescribing physician's request under subsection (B) is considered approved, and reimbursement of the drug that is included but not recommended and prescribed for use by the injured employee is authorized.

(E) If the third party's determination under subsection (C) is to deny the prescribing physician's request to permit the use of the drug that is included but not recommended on the formulary or not included in the formulary:

(1) the employer shall notify the prescribing physician and the injured employee; and

(2) the injured employee may apply to [workers' compensation board] for a final determination concerning the third party's determination under subsection (C)

(F) Notwithstanding subsections (A) through (E), during a medical emergency, an employee shall receive a drug prescribed for the employee even if the drug is a drug that is included but not recommended on the formulary.

Section 5. Rules

The [state department] shall promulgate rules necessary for the implementation of the formulary.

Drafting Note: Prior to implementing a drug formulary, the department should strongly consider providing guidance and educational outreach to impacted stakeholders regarding how to access and use the drug formulary.

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Section 6. Effective Date

This Act shall take effect [xxx days] following enactment.

Drafting Note: The department should be given an adequate amount of time to develop rules to implement a formulary, no less than 6 months.