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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 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. 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 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.

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

(F) 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:

- (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 or a drug that is not included 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 or a drug that is not included 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] an independent review organization selected by the [department] 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.~~

~~(D) The independent review organization shall render a written determination as to whether the requested drug is medically necessary for treatment of the injured employee within three (3) business days of receipt of a non-expedited request and within twenty-four (24) hours of an expedited request.~~

~~(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. Independent Review Organization Requirements

(A) The [department] shall contract with an independent review organization that is independent of any workers' compensation insurer or workers' compensation claims administrator doing business in this state. The independent review organization shall meet all of the following requirements:

(1) Be a URAC Accredited independent review organization.

(2) Employ a medical director who shall be responsible for quality assurance regarding clinical issues.

(3) Medical professionals selected by the independent review organization to review drug disputes shall be licensed physicians, as defined by Section 3209.3 , in good standing, who meet the following minimum requirements:

(a) The physician shall be a clinician knowledgeable in the treatment of the employee's medical condition, knowledgeable about the proposed treatment, and familiar with guidelines and protocols in the area of treatment under review.

(b) Notwithstanding any other law, the physician shall hold a nonrestricted license in any state of the United States, and for physicians and surgeons holding an M.D. or D.O. degree, a current certification by a recognized American medical specialty board in the area or areas appropriate to the condition or treatment under review. The independent review organization shall give preference to the use of a physician licensed in [state] as the reviewer.

(c) The physician shall have no history of disciplinary action or sanctions, including, but not limited to, loss of staff privileges or participation restrictions, taken or pending by any hospital, government, or regulatory body.

(4) Must develop and maintain a secure automated system to allow for electronic processing of all drug disputes submitted to the independent review organization.

Section 6. Independent Review Organization – Conflict of Interest

(A) Neither the independent review organization, nor its physician reviewers, shall have any material professional, material familial, or material financial affiliation with any of the following:

(1) The employer, insurer or claims administrator.

(2) Any officer, director, employee of the employer, or insurer or claims administrator.

(3) A physician, the physician's medical group, the physician's independent practice association, or other provider involved in the medical treatment in dispute.

(4) The facility or institution at which either the proposed health care service, or the alternative service, if any, recommended by the employer, would be provided.

(5) The development or manufacture of the drug proposed by the employee whose treatment is under review, or the alternative therapy, if any, recommended by the employer.

(6) The injured employee or the employee's immediate family, or the employee's attorney.

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Section 7. Appeal Rights.

(A) The determination of the independent review organization shall be deemed to be the determination of the [department] and shall be binding on all parties.

(B) The determination of the [department] shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:

(1) The [department] acted without or in excess of the [department's] powers.

(2) The determination of the [department] was procured by fraud.

(3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 6.

(4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.

(5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review and not a matter that is subject to expert opinion.

Section 58. Rules

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

Section 69. Effective Date

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