

**QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS
WITH THE ARKANSAS LEGISLATIVE COUNCIL**

DEPARTMENT/AGENCY Arkansas Insurance Department
DIVISION Legal Division
DIVISION DIRECTOR Jim Brader
CONTACT PERSON Booth Rand
ADDRESS 1200 West Third Street
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NAME OF PRESENTER AT COMMITTEE MEETING Booth Rand, Managing Attorney
PRESENTER E-MAIL booth.rand@arkansas.gov

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question **completely** using layman terms. You may use additional sheets, if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

**Jessica Sutton, ESQ.
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201**

1. What is the short title of this rule? Rule 122: PRIOR AUTHORIZATION WAIVERS FOR POST-ACUTE TRANSFERS

2. What is the subject of the proposed rule? This proposed emergency rule prohibits prior authorization or pre-certification requirements by health benefit plans on insured patients transferring from a hospital to a post-acute setting.

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes No
If yes, please provide the federal rule, regulation, and/or statute citation. _____

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes No
If yes, what is the effective date of the emergency rule? Immediately upon approval by Executive Committee and by ALC

When does the emergency rule expire? Within 120 days from approval by ALC.

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act?

Yes No

5. Is this a new rule? Yes No

If yes, please provide a brief summary explaining the regulation. See Attached Summary

Does this repeal an existing rule? Yes No

If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes No

If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."** See attached mark-up of proposed changes.

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation.

Pursuant to Ark. Code Ann. §23-99-1118, the State Insurance Department may promulgate rules for the implementation of this subchapter governing the "Prior Authorization Transparency Act." Ark. Code Ann. §25-15-204 (b) (1) states that if an agency finds that imminent peril to the public health, safety, or welfare or compliance with federal laws or regulations requires adoption of a rule upon less than thirty (30) days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it may choose, to adopt an emergency rule. The rule may be effective for no longer than one hundred twenty (120) days

7. What is the purpose of this proposed rule? Why is it necessary?

See attached Summary.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b). <https://www.insurance.arkansas.gov/pages/industry-regulation/>

9. Will a public hearing be held on this proposed rule? Yes No

If yes, please complete the following:

Date: Not applicable

Time: Not applicable

Place: Not applicable

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

No comment period because this will not be promulgated as a permanent Rule.

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

Immediately upon approval by the ALC.

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. We will update this after we send out our NOPH (“Notice of Public Hearing”) and receive newspaper documentation from the Arkansas Democrat-Gazette.

13. Please provide proof of filing the rule with the Secretary of State and the Arkansas State Library as required pursuant to Ark. Code Ann. § 25-15-204(e).

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

Not applicable.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Arkansas Insurance Department

DIVISION Legal Division

PERSON COMPLETING THIS STATEMENT Booth Rand

TELEPHONE 501-371-2820 **FAX** 501-371-2618 **EMAIL:** _____

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE RULE 122: PRIOR AUTHORIZATION WAIVERS FOR POST-ACUTE TRANSFERS

- 1. Does this proposed, amended, or repealed rule have a financial impact? Yes No
- 2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes No
- 3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

(a) How the additional benefits of the more costly rule justify its additional cost;

(b) The reason for adoption of the more costly rule;

(c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;

(d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

(a) What is the cost to implement the federal rule or regulation?

NONE or NOT APPLICABLE.

Current Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

(b) What is the additional cost of the state rule?

Current Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

There should be no financial impact on small business.

Current Fiscal Year

\$ _____

Next Fiscal Year

\$ _____

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

NONE

Current Fiscal Year

\$ _____

Next Fiscal Year

\$ _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

NOT APPLICABLE

Yes

No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

Request for Governor's Approval of Proposed Rules and Regulations

Department/Agency: Arkansas Insurance Department

Short Title of Rule: Rule 122: PRIOR AUTHORIZATION WAIVERS FOR POST-ACUTE TRANSFERS

New Rule: Yes No **Amendment to Existing Rule:** Yes No

State Mandate: Yes No **Federal Mandate:** Yes No

If yes, please provide the rule, regulation, and/or statute citation:

Authority to Promulgate the Rule: Ark. Code Ann. §23-99-1118 and Ark. Code Ann. §25-15-204 (b)(1)

Proposed Effective Date: Immediately upon approval by the Executive Committee of the Arkansas Legislative Council.

Emergency Rule: Yes No **Expedited Rule Requested:** Yes No

Summary of Proposed New Rule or Proposed Amendment to Existing Rule:

See attached Summary.

Financial Impact: Yes No Unknown; **If yes or unknown, please explain:**

Public Hearing: Yes No **Controversial:** Yes No

Documents Required for Approval Process

Please note that the Governor's office will not begin the approval process if any of the following applicable documents are not enclosed with the approval request.

- BLR Questionnaire
- BLR Financial Impact Statement
- Proposed Rule – clean version
- Mark-Up of Rule, if amended from previous version
- Copy of Act or Regulation, if Rule is pursuant to State or Federal mandate

EMERGENCY RULE 122

PRIOR AUTHORIZATION WAIVERS FOR POST-ACUTE TRANSFERS

- 1. PURPOSE**
- 2. STATEMENT OF EMERGENCY**
- 3. AUTHORITY**
- 4. DEFINITIONS**
- 5. PRIOR AUTHORIZATION WAIVERS FOR POST-ACUTE TRANSFERS**
- 6. EFFECTIVE DATE**

SECTION 1. PURPOSE

The purpose of this Rule is to temporarily reduce insurance barriers or limitations causing an increase in hospital occupancy and resources during the COVID-19 pandemic due to prior authorization protocols on post-acute transfers of patients.

SECTION 2. STATEMENT OF EMERGENCY

The Arkansas Insurance Commissioner (“Commissioner”) finds that insurance barriers exist causing unnecessary hospitalizations and hospital resource costs due to health plans applying prior authorization protocols for patients transferring from hospitals to post-acute facilities, skilled nursing facilities, and acute inpatient rehabilitation facilities. The Commissioner finds that a public emergency exists to temporarily eliminate prior authorization requirements that are burdening hospital occupancy and resources as patients wait on authorizations from an insurer, HMO, or Medicare Advantage organization before transitioning to a post-acute care facility from the hospital.

SECTION 3. AUTHORITY

Pursuant to Ark. Code Ann. §23-99-1118, the State Insurance Department may promulgate rules for the implementation of this subchapter governing the “Prior Authorization Transparency Act.” Ark. Code Ann. §25-15-204 (b) (1) states that if an agency finds that imminent peril to the public health, safety, or welfare or compliance with federal laws or regulations requires adoption of a rule upon less than thirty (30) days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any

abbreviated notice and hearing that it may choose, to adopt an emergency rule. The rule may be effective for no longer than one hundred twenty (120) days.

SECTION 4. DEFINITIONS

Unless otherwise stated in this Rule, the definitions in Ark. Code Ann. § 23-99-1103 shall apply to the provisions or sections of this Rule.

SECTION 5. PRIOR AUTHORIZATION WAIVERS FOR POST-ACUTE TRANSFERS

No health benefit plan, or Utilization Review entity, shall impose a prior authorization protocol, pre-certification requirement, or step therapy procedure for, or upon, transfers of insured patients from hospitals to a post-acute setting or facility which includes but is not limited to skilled nursing facilities, or acute inpatient rehabilitation facilities during the effective time period of this Rule.

SECTION 6. EFFECTIVE DATE

This Emergency Rule shall be effective for one hundred and twenty (120) days following approval by the Arkansas Legislative Council, when it shall expire.

ALAN McCLAIN
INSURANCE COMMISSIONER

DATE

2019 Arkansas Code

Title 23 - Public Utilities and Regulated Industries

Subtitle 3 - Insurance

Chapter 99 - Healthcare Providers

Subchapter 11 - Prior Authorization Transparency Act

§ 23-99-1118. Rules

Universal Citation: AR Code § 23-99-1118 (2019)

The State Insurance Department may promulgate rules for the implementation of this subchapter.

SUMMARY

RULE 122

PRIOR AUTHORIZATION WAIVERS FOR

POST-ACUTE TRANSFERS

AID issues this emergency rule in order to help reduce insurance barriers which are operating to slow down or hinder hospital transfers of patients, from a hospital to a post-acute setting. Such barriers are adversely impacting hospital occupancy at a time that more occupancy and resources are needed by our hospitals for covid-related responses. The primary insurer impediments are derived from insurer, HMO, or medicare advantage prior authorization or pre-certification requirements applying to such transfers, for transfers to skilled nursing facilities as well as to post-acute inpatient rehabilitation centers or facilities.

The rule is simple as it entirely prohibits the imposition of any pre-cert requirement or step therapy protocol from the insurer to such transfers. The rule applies to all health benefit plans subject to the Arkansas Prior authorization Act. This a very broad Act. The definition of health benefit plan is in Ark. Code Ann. § 23-99-1103(7): (A) "Health benefit plan" means any individual, blanket, or group plan, policy, or contract for healthcare services issued or delivered by a healthcare insurer in this state. "Healthcare insurer" means an entity that is subject to state insurance regulation, including an insurance company, a health maintenance organization, a hospital and medical service corporation, a risk-based provider organization, and a sponsor of a nonfederal self-funded governmental plan. This would include EBD and the PASSE program.

The authority for this rule is in two (2) parts. One is from the Prior Authorization Transparency Initiative which gives the Department authority to issue rules to implement the Prior Authorization Transparency Act in Ark. Code Ann. §§ 23-99-1101 et seq.; the other authority is the APA for issuance of an emergency rule in Ark. Code Ann. §25-15-204 (b) (1).

We do NOT intend to adopt the currently proposed emergency rule as a permanent rule within 120 days. The proposed Emergency Rule will expire in 120 days.



STATE OF ARKANSAS
BUREAU OF
LEGISLATIVE RESEARCH

Marty Garrity, Director
Kevin Anderson, Assistant Director
for Fiscal Services
Tim Carlock, Assistant Director
for Information Technology
Matthew Miller, Assistant Director
for Legal Services
Estella Smith, Assistant Director
for Research Services

MEMORANDUM

TO: Members, ALC – Executive Subcommittee

CC: Marty Garrity, Director, Bureau of Legislative Research;
Jessica Sutton, Administrator, Administrative Rules Review Section, Legal Services Division

FROM: Suba Desikan, Legislative Attorney, Administrative Rules Review Section, Legal Services Division

DATE: December 17, 2020

SUBJECT: Legal Authorization for the State Insurance Department’s Emergency Promulgation of Rule 122 – Prior Authorization Waivers for Post-Acute Transfers

The State Insurance Department (AID) is proposing an emergency rule which will temporarily prohibit prior authorization or pre-certification requirements by health benefit plans on insured patients transferring from a hospital to a post-acute setting. The purpose of this rule is to temporarily reduce insurance barriers or limitations, which are causing an increase in hospital occupancy and resources during the COVID-19 pandemic.

The State Insurance Department has authority to promulgate rules for the implementation of Title 23, Chapter 99, Subchapter 11 of the Arkansas Code concerning the Prior Authorization Transparency Act. *See* Ark. Code Ann. § 23-99-1118. The rule would apply to all health benefit plans subject to the Arkansas Prior Authorization Act, as defined in Ark. Code Ann. §§ 23-99-1103(7) and (8), including EBD and the PASSE program.

In response to a question posed by staff concerning the waiver prohibition contained in Ark. Code Ann. § 23-99-1110, the agency stated that no requirements of the Prior Authorization Transparency Act were being waived and that an insurer cannot waive those requirements in a contract to get around the law.