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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

WCD 15-2020
CHAPTER 436
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION

FILED
09/30/2020 11:19 AM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Processing workers' compensation claims for COVID-19 or SARS-CoV-2 exposure

EFFECTIVE DATE: 10/01/2020 THROUGH 03/29/2021

AGENCY APPROVED DATE: 09/30/2020

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Filed By:
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NEED FOR THE RULE(S):

This temporary rule is needed to promote appropriate and consistent processing of claims for COVID-19 or exposure to SARS-CoV-2.

JUSTIFICATION OF TEMPORARY FILING:

Failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned. Stakeholders have expressed concerns about inconsistencies in the processing of claims for COVID-19 or exposure to SARS-CoV-2, and have recommended immediate action to promote reasonable investigation of these claims.

The agency finds that issuing temporary rules under ORS 183.335(5) is appropriate because the COVID-19 pandemic has been declared a public health emergency, and immediate action is warranted to promote appropriate processing of claims for COVID-19 or exposure to SARS-CoV-2.

The agency finds that issuing permanent rules under ORS 183.335(2) and (3) is not appropriate because permanent rulemaking requires at least 49 days under ORS 183.335(1)(d), and the need for rules to promote appropriate claims processing is immediate and emergent.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Letter dated July 20, 2020, from the Management-Labor Advisory Committee (MLAC) to Gov. Kate Brown, including "DRAFT COVID RULES," records from the MLAC COVID-19 subcommittee meeting of Sept. 24, 2020, and written advice on the draft rule posted for comment. These documents are available for public inspection upon request to the Workers' Compensation Division, 350 Winter Street NE, Salem, Oregon 97301-3879. Please contact Fred Bruyns, rules coordinator, 503-947-7717, fred.h.bruyns@oregon.gov.

ADOPT: 436-060-0141

RULE SUMMARY: Adopted OAR 436-060-0141:

- Defines "COVID-19," "isolation," "medical service provider," "presumptive case," "quarantine," and "SARS-CoV-2," as these terms are used in the rule;
- Explains that, under OAR 436-060-0140(1), insurers must conduct a "reasonable investigation" before denying any claim, and describes what a reasonable investigation must include when the claim is for COVID-19 or exposure to SARS-CoV-2 on and after Oct. 1, 2020; and
- Explains that as of Oct. 1, 2020, if an insurer has reported to the director five or more claims for COVID-19 or exposure to SARS-CoV-2, regardless of whether those claims have been accepted or denied, the director will audit the insurer's files for all claims denied by the insurer for COVID-19 or exposure to SARS-CoV-2 for which the denial has become final by operation of law by the date of audit.

CHANGES TO RULE:

436-060-0141

Claims for COVID-19 or Exposure to SARS-CoV-2

(1) For the purpose of this rule:¶

(a) "COVID-19" means a disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).¶

(b) "Isolation" means the physical separation and confinement of a person who is infected or reasonably believed to be infected with COVID-19 from nonisolated persons to prevent or limit the transmission of COVID-19 to nonisolated persons.¶

(c) "Medical service provider" means a person duly licensed to practice one or more of the healing arts.¶

(d) "Presumptive case" means:¶

(A) The person has not tested positive for COVID-19;¶

(B) The person has an acute illness with at least two of the following symptoms: shortness of breath, cough, fever, new loss of smell or taste, or radiographic evidence of viral pneumonia;¶

(C) There is no more likely alternative diagnosis; and¶

(D) The person, within the 14 days before illness onset, had close contact with a confirmed case of COVID-19.¶

(e) "Quarantine" means the physical separation and confinement of a person who has been or may have been exposed to COVID-19 or SARS-CoV-2 and who does not show signs or symptoms of COVID-19, from persons who have not been exposed to COVID-19 or SARS-CoV-2, to prevent or limit the transmission of COVID-19 to other persons.¶

(f) "SARS-CoV-2" means the strain of coronavirus that causes COVID-19.¶

(2) Under OAR 436-060-0140(1), insurers must conduct a "reasonable investigation" before denying any claim. For all claims filed for COVID-19 or exposure to SARS-CoV-2 on and after Oct. 1, 2020, in addition to the requirements of OAR 436-060-0140(1), a reasonable investigation must include:¶

(a) Investigating whether or not the nature of the worker's employment resulted in a likely exposure to COVID-19 or SARS-CoV-2;¶

(b) Determining whether the worker did not work for a period of quarantine or isolation at the direction of a medical service provider, the Oregon Health Authority Public Health Division, a local public health authority as defined in ORS 431.003, or the employer, for purposes of discovering information that may be relevant to the compensability determination;¶

(c) Obtaining a medical or other expert opinion if, before a compensability denial is issued, the worker tests positive for COVID-19 or a medical service provider diagnoses a presumptive case of COVID-19, the insurer is aware of the test results or presumptive diagnosis, and the source of the exposure is unclear; and¶

(d) Determining whether medical services were required as a result of potential workplace exposure to COVID-19 or SARS-CoV-2, even if the worker ultimately did not test positive for COVID-19.¶

(3) If, as of Oct. 1, 2020, an insurer has reported to the director, as required by OAR 436-060-0011, five or more claims for COVID-19 or exposure to SARS-CoV-2, regardless of whether those claims have been accepted or

denied, the director will audit the insurer's files for all denied claims for COVID-19 or exposure to SARS-CoV-2, for which the denial has become final by operation of law by the date of audit.¶

(a) For claims filed before Oct. 1, 2020, the director's audit will focus on whether the insurer conducted a reasonable investigation as required by OAR 436-060-0140(1).¶

(b) For claims filed on and after Oct. 1, 2020, the director's audit will focus on whether the insurer complied with section (2) of this rule.¶

(c) The director retains the authority to audit additional insurers and claim files as the director determines appropriate.¶

(d) Failure to comply with requirements in ORS chapter 656, OAR chapter 436, or orders of the director subjects the insurer to civil penalties under ORS 656.745(2).

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.262, 656.745