

BEFORE THE DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES  
OF THE STATE OF MONTANA

In the matter of the adoption of                    ) NOTICE OF ADOPTION OF  
Temporary Emergency Rule I                    ) TEMPORARY EMERGENCY RULE  
pertaining to waiver of swing-bed            )  
requirements                                        )

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) is adopting the following emergency rule to optimize the department's, providers', and other stakeholders' continued response to COVID-19, and to ensure access to services and supports to meet the needs of Montanans affected by COVID-19.
2. Because the process for the promulgation of administrative rules under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA) is inflexible in terms of certain mandated timelines, the typical process for promulgating administrative rules to change current regulatory requirements would result in a situation where the department's ability to adequately respond to the pandemic would be temporarily disrupted.
3. Since August 2021, the number of newly diagnosed COVID-19 cases has increased significantly in Montana.<sup>1</sup> This has led to a significant increase in the number of hospitalizations and deaths statewide. The increased number of individuals with COVID-19 requiring hospitalization is creating significant challenges to Montana's hospital systems, which are reaching or exceeding their bed capacity limits (e.g., acute care and intensive care beds) and the availability of equipment/supplies (e.g., ventilators).<sup>2</sup> Additionally, hospitals across the state are experiencing significant staffing shortages (e.g., nurses, nurses' aides). Because of these challenges, Montana hospitals need to be able to efficiently discharge patients when they otherwise become eligible for discharge to other care settings.
4. A swing-bed hospital is a licensed hospital, critical access hospital, or licensed medical assistance facility that has federal approval to provide post-hospital, skilled nursing care to patients. A swing-bed is a bed approved under federal regulations to provide either acute care or extended skilled nursing care to a patient. A swing-bed is used to transition a patient from acute care to skilled nursing care without the patient leaving the hospital.

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<sup>1</sup> Montana Department of Public Health and Human Services. Interim Analysis of COVID-19 cases in Montana (as of 9/3/2021) [https://dphhs.mt.gov/assets/publichealth/CDEpi/DiseasesAtoZ/2019-nCoV/EpiProfile/EPIPROFILE\\_09032021\\_final.pdf](https://dphhs.mt.gov/assets/publichealth/CDEpi/DiseasesAtoZ/2019-nCoV/EpiProfile/EPIPROFILE_09032021_final.pdf)

<sup>2</sup> Montana Department of Public Health and Human Services. COVID-19 Hospital Occupancy and Capacity in Montana Status Report (as of 9/13/2021) <https://dphhs.mt.gov/assets/publichealth/CDEpi/DiseasesAtoZ/2019-nCoV/Reports/HospitalReport09132021.pdf>

5. Under ARM 37.40.402 and 37.40.405, before transferring a Medicaid member to a swing-bed, the swing-bed hospital must determine that no appropriate nursing facility bed is available to the patient within a 25-mile radius of the hospital, and the hospital must maintain written documentation of inquiries made to nursing facilities about the unavailability of an appropriate bed. When a nursing facility bed within a 25-mile radius of the hospital becomes available, the administrative rules require that the hospital discharge the Medicaid patient to the appropriate nursing facility bed within 72 hours of the nursing facility bed becoming available.

6. Hospital systems, including critical access hospitals that serve rural populations in Montana, are experiencing a surge of demand for medical services by Montanans infected with the COVID-19 virus, in particular the highly contagious Delta variant which is now the predominant strain in Montana. In addition to facing the demand for medical services, hospitals are experiencing staff shortages and need to reduce administrative burden on staff in the management of available beds and services. The department has received communications from hospital systems and other stakeholders that the administrative swing-bed requirements impose a significant burden on hospitals in this challenging time.

7. For the foregoing reasons, the department adopts this emergency rule. Promulgation of this emergency rule is necessary because no other administrative action can be taken that would alleviate the burden imposed by the requirements being waived and enable hospitals and critical access hospitals to continue to address the COVID-19 public health emergency in an effective and efficient manner. EMERGENCY RULE I provides a statement of department intent to exercise regulatory discretion related to, and waive compliance with, specific administrative rules of Montana to address the problems identified above. This rule will remain in effect no longer than 120 days after the date of adoption.

8. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, contact Heidi Clark at the Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov).

9. The emergency rule is effective immediately, September 17, 2021.

10. The text of the emergency rule provides as follows:

**EMERGENCY RULE I WAIVER OF SWING-BED REQUIREMENTS DURING EMERGENCY** (1) The department will exercise regulatory discretion and waive compliance with:

- (a) swing-bed requirements in ARM 37.40.405(1)(b) and (2); and
- (b) to the extent necessary to facilitate payment under Medicaid, ARM 37.40.402 (1)(b)(i)(A) through (D).

AUTH: 2-4-303, 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

11. The rationale for the temporary emergency rule is set forth in paragraphs 1 through 7.

12. It is presently unknown whether a standard rulemaking procedure will be undertaken prior to the expiration of this temporary emergency rule. The necessity and efficacy of the emergency rule will be continuously evaluated as the effort to combat the COVID-19 pandemic in Montana develops.

13. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 8 or may be made by completing a request form at any rules hearing held by the department.

14. The bill sponsor contact requirements of 2-4-302, MCA, do not apply to this rulemaking. Special notice, pursuant to 2-4-303, MCA, was made to each member of the Children, Families, Health, and Human Services Interim Committee and each member of the committee staff using electronic mail on September 17, 2021.

/s/ Chad G. Parker

Chad G. Parker  
Rule Reviewer

/s/ Adam Meier

Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State September 17, 2021.