

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

In the matter of the adoption of)
Temporary Emergency Rule I to allow)
for COVID-19-related regulatory)
discretion beyond the expiration of)
the Governor-declared state of)
emergency)

NOTICE OF ADOPTION OF
TEMPORARY EMERGENCY RULE

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 as the state transitions out of a state of emergency, which ended effective June 30, 2021.

2. During a state of emergency, 10-3-104(2)(a), MCA, grants the Governor the power to suspend regulatory statutes, orders, or state agency rules that "prevent, hinder, or delay necessary action in coping with the emergency ..." Governor Gianforte's February 12, 2021, "Directive Implementing Executive Order 2-2021" provided a number of COVID-19-related regulatory flexibilities to Montana health care providers and facilities, as well as other entities with regulatory relationships with the department. This directive also provided state law coordination with a number of federal COVID-19-related waivers for federal health and human service programs administered and/or regulated by the department. The department finds that the regulatory flexibilities available under these federal waivers remain necessary for Montana to effectively continue its response to the COVID-19 pandemic.

3. 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 extend state law flexibilities to coordinate with the federal waivers would result in a situation where the department's ability to adequately respond to the pandemic would be temporarily disrupted. Some of these waivers, for example, are presently providing for extended telehealth capacity that allows for those individuals most at-risk of complications from a COVID-19 infection to access critical health care services from the safety of their own homes. The demand for health care practitioners and facilities needed to respond to the pandemic has put significant strain on a health care system where a majority of Montana counties already faced shortages of health care and mental health practitioners. Telehealth flexibilities have allowed providers and facilities to make sure that health care needs do not go unmet during a period of increased demand.

4. Another flexibility allows the department to apply Medicaid eligibility standards, methodologies, and procedures that are no more restrictive than those in effect on January 1, 2020, which is a prerequisite to the state receiving the 6.2 percentage point increase in federal Medicaid matching funds provided by the Families First Coronavirus Response Act (Public Law 116–127). An effective response to the ongoing, albeit diminished, COVID-19 pandemic requires that the department and its community partners be able to continue utilizing the full array of tools made available by Congress and the U.S. Department of Health and Human Services (HHS).

5. The Public Health Service Act (Public Law 78–410) was used to declare a federal public health emergency (PHE) in the entire United States on January 31, 2020. The PHE has been renewed at 90-day intervals on April 21, 2020, July 23, 2020, October 2, 2020, January 7, 2021, and April 15, 2021 (effective April 21, 2021). The department intends, using emergency rule where it has grants of rulemaking authority, to exercise regulatory discretion consistent with the federal COVID-19 waivers until the end of the month in which the Secretary of HHS declares that the PHE no longer exists or after a 90-day renewal period elapses and the PHE is not renewed.

For the foregoing reasons, the department adopts this emergency rule. This rule will remain in effect no longer than 120 days after the date of adoption.

6. EMERGENCY RULE I provides a statement of department intent to exercise regulatory discretion related to specific administrative rules of Montana to allow for a coordinated state and federal response to the COVID-19 pandemic. These definitions are also necessary to help health care providers, operators of facilities, and recipients of services understand that the federal COVID-19 waivers and flexibilities issued under federal law can be relied upon in this state without risk of adverse state regulatory or administrative action.

7. 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.

8. The department intends to apply this emergency rule adoption retroactively to July 1, 2021.

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

EMERGENCY RULE I EXERCISE OF REGULATORY DISCRETION DURING EMERGENCY Throughout the pendency of the federal Public Health Emergency (PHE) declared pursuant to the Public Health Service Act (Public Law 78–410) and until the last day of the month in which the PHE is rescinded or expires,

unless otherwise prohibited by Montana state statute, the department will exercise regulatory discretion and waive strict compliance with the following categories of administrative rules to the limited extent that they conflict with the department's implementation of federal COVID-19-related guidance, waivers, or rules:

(1) Training, and other training-related annual recertification requirements in congregate care facilities:

(a) provisions of ARM Title 37, chapter 34, related to services of the developmental disabilities program and the home and community-based services program (HCBS);

(b) provisions of ARM Title 37, chapter 40, related to home and community-based services for elderly and physically disabled persons;

(c) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(d) provisions of ARM Title 37, chapter 100, related to community residences; and

(e) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(2) Staffing-related licensing and certification requirements in congregate care facilities:

(a) provisions of ARM Title 37, chapter 40, related to home and community-based services for elderly and physically disabled persons;

(b) provisions of ARM Title 37, chapter 90, related to the home and community-based services waiver for adults with severe and disabling mental illness;

(c) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(d) provisions of ARM Title 37, chapter 100, related to community residences; and

(e) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(3) Licensing and certification requirements related to permissible premises, settings, or construction standards in situations:

(a) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(b) provisions of ARM Title 37, chapter 100, related to community residences; and

(c) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(4) Telehealth face-to-face requirements for the provision of medical services: ARM 37.27.102(9); ARM 37.27.902(2) and (3), to the extent that provider manuals require face-to-face interactions; ARM 37.27.517(1)(b); ARM 37.34.3005(2), to the extent the rates manual requires face-to-face interaction; ARM 37.40.702(8) and (9); ARM 37.40.805(1) through (3), to the extent Medicare normally requires face-to-face encounters; ARM 37.40.1005(4), to the extent this requires in-person meetings; ARM 37.40.1114(4), to the extent this requires in-person meetings; ARM 37.86.901(2); ARM 37.86.902(2)(b); ARM 37.86.3405(2); ARM 37.86.4402(1); ARM 37.87.703(1)(h), to the extent that home support services

require face-to-face interactions; ARM 37.87.903(7), to the extent the provider manual requires face-to-face interaction; ARM 37.87.1401(3)(a), to the extent this limits reimbursement for telephone contacts that exceed the number of reimbursed face-to-face contacts in a four-week period; ARM 37.87.1402(5); ARM 37.87.1410(6)(b); ARM 37.88.101(2), to the extent the provider manual requires face-to-face interaction; ARM 37.89.501(2); ARM 37.106.1916(5); ARM 37.106.1935(4); and ARM 37.106.2011(3), to the extent this requires in-person, in-home meetings.

(5) Any provision of ARM 37.82.205 and 37.84.107, to the extent that the rule would end any individual's eligibility for those enrolled as of March 18, 2020, through the end of the month in which the PHE ends, unless the individual ceases to be a state resident or requests a voluntary disenrollment.

(6) Licensing or certification requirements for congregate care facilities that require background checks:

(a) provisions of ARM 37.51.207 and 37.51.310, related to youth foster home license applications;

(b) provisions of ARM 37.40.1018(7), related to self-directed community first choice services providers;

(c) provisions of ARM 37.97.132 and 37.97.140, related to the licensure of youth care facilities;

(d) provisions of ARM 37.100.138(1) and (2) and ARM 37.100.165(5), related to community residences.

AUTH: 2-4-303, 50-5-103, 50-5-215, 52-2-111, 52-2-603, 53-2-201, 53-6-113, 53-6-402, 53-24-204, 53-24-208, 53-24-209, 53-24-215, MCA

IMP: 50-5-103, 50-5-202, 50-5-203, 50-5-204, 50-5-215, 52-2-603, 52-2-622, 53-2-201, 53-24-204, 53-24-209, 53-24-215, 53-6-101, 53-6-111, 53-6-113, 53-6-131, 53-6-142, 53-6-402, MCA

10. The rationale for the temporary emergency rule is set forth in paragraphs 1 through 6.

11. It is presently unknown whether a standard rulemaking procedure will be undertaken prior to the expiration of the 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.

12. 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 7 or may be made by completing a request form at any rules hearing held by the department.

13. 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 July 2, 2021.

/s/ Nicholas Domitrovich
Nicholas Domitrovich
Rule Reviewer

/s/ Adam Meier
Adam Meier, Director
Public Health and Human Services

Certified to the Secretary of State July 2, 2021.