



**COMMONWEALTH OF KENTUCKY
DEPARTMENT OF INSURANCE
FRANKFORT, KENTUCKY**

**ADVISORY OPINION
2021-05**

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Department of Insurance on the specified issue. The Advisory Opinion is not legally binding on either the Department or the reader.

TO: ALL INSURERS AUTHORIZED TO TRANSACT BUSINESS IN KENTUCKY UNDER A HEALTH LINE OF AUTHORITY & ALL UTILIZATION REVIEW ENTITIES REGISTERED BY THE KENTUCKY DEPARTMENT OF INSURANCE TO TRANSACT BUSINESS IN KENTUCKY

FROM: SHARON P. CLARK, COMMISSIONER
KENTUCKY DEPARTMENT OF INSURANCE

RE: UTILIZATION REVIEW UNDER KRS 304.17A-600 THROUGH 304.17A-633

DATE: DECEMBER 2, 2021

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The purpose of this Advisory Opinion is to clarify requirements for Utilization Review entities registered by the Department of Insurance (“Department”) pursuant to KRS 304.17A-600 through 304.17A-633. The Department has recently become aware of incomplete Utilization Review processes. For example, multiple insurance companies have informed the Department that they have contracted with registered Utilization Review entities to perform their entire Utilization Review process; however, upon verification, it was discovered that the Utilization Review entity was only providing services for a part of the process, rather than the entirety of it. This Advisory Opinion clarifies that to be registered as a Utilization Review entity, the entity shall comply with all requirements of the relevant statutes and regulations and demonstrate this compliance in its policies and procedures.

KRS 304.17A-607, titled “Duties of insurer or private review agent performing utilization reviews,” provides that insurers and Utilization Review entities “shall not provide or perform utilization reviews without being registered with the department,” and sets out the requirements for compliance. In addition, 806 KAR 17:280 Section 2 provides further details on the registration requirements for Utilization Review entities.

To become registered as a Utilization Review entity, an entity must comply with all requirements of KRS 304.17A-600 through KRS 304.17A-633, 806 KAR 17:280, and 806 KAR 17:290. The Department will no longer accept the statement of “N/A” or “not delegated for that function” on the application form as sufficient demonstration of compliance with the above-referenced statutes and regulations. The Department will register an entity only if it meets all applicable statutory and regulatory requirements.

For purposes of this Advisory Opinion, it should be noted that the Department interprets ‘Peer Review,’ based strictly on the URAC definition, as “*A request by telephone for additional review of a utilization management determination not to certify, performed by the peer reviewer who reviewed the original decision, based on submission of additional information or a peer-to-peer discussion.*” The Department does not consider ‘Peer Review’ to be a mere recommendation on whether service should be approved or denied during the primary review of the service. See *Com. v. Barlow*, 454 S.W.3d 862, 870 (Ky. Ct. App. 2014) (interpreting the term ‘peer review’ within the specific statutory context applicable). Therefore, if a Utilization Review entity is reviewing the medical necessity of a service or procedure for determination of whether it should be a covered service, the Department will consider this to be a Utilization Review decision, as that term is defined in KRS 304.17A-600(17).

Depending on the type of clients serviced, or the type of policies offered by the Utilization Review entity, some entities will not be required to comply with KRS 304.17A-621 through KRS 304.17A-633 or 806 KAR 17:290. This exception is limited to those Utilization Review entities with ERISA Self-Funded clients, Medicaid clients, Non-health benefit plans that do not cover hospital benefits, and Limited Health Service Benefit Plans as defined in KRS 304.17C-010. **All others shall be required to comply fully, or to provide their client’s external review policies, procedures, and letters to demonstrate proper compliance.**

The Department will not accept a simple restatement or recitation of the statute or regulation as being compliant. The policy or procedure should describe, in detail, the entity’s actual process for compliance, with the applicable statutory and regulatory requirements.

This Advisory Opinion will be effective for all new and renewed Utilization Review applications beginning January 1, 2022. The Department will not prevent any currently registered Utilization Review entity from continuing its current registration. However, upon the expiration of the current registration, the Department will require the entity to comply with this Advisory Opinion or its registration will not be renewed and will expire.

This Advisory Opinion is intended to serve as notice to all insurers with health lines of authority, and all Utilization Review entities licensed by the Department, of the Department’s interpretation

of KRS 304.17A-600 through KRS 304.17A-633, 806 KAR 17:280, and 806 KAR 17:290. Licensees and registered entities are charged with notifying their agents and employees of the Department's interpretation. The Department does not provide legal advice to insurers or entities. The position provided herein has been offered to clarify the Department's regulatory authority pursuant to KRS 304.2-100.



Sharon P. Clark, Commissioner
Kentucky Department of Insurance
On this 2 day of December 2021