

THIRD PARTY ADMINISTRATOR UPDATE

REGULATORY AND LEGISLATIVE DEVELOPMENTS

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North Carolina Insurance Department Enacts TPA Audit Standards

As noted in our previous newsletter, effective July 1, 2010, North Carolina House Bill 1183 required insurers licensed in North Carolina to file a certification of completion with the North Carolina Insurance Commissioner that the insurer has completed semi-annual audits of its contracted TPAs.

Subsequent to the passage of this new law, the North Carolina DOI issued regulations that address such audits. Also effective on July 1, 2011, this new regulation requires, among other things, the following:

- **Review or On-Site Audit.** The review or on-site audit may be performed by either the insurer or the insurer's designated representative. The insurer's designated representative cannot be an employee of or an independent contractor with the TPA and must be an independent, disinterested person or entity.
- **Acknowledgment of Statutes in Certification Filings.** Requires specific language to be included on the certification filings, including acknowledgment of the applicable statutes and other information.
- **On-Site Audit Certification.** Requires the insurer to certify that the insurer's review and the on-site audit include an assessment of the TPA's business practices and procedures, including the TPA's compliance with provisions of their agreement with the insurer, contract management, claims administration, claims adjudication and payment, underwriting, collection of premiums and other monies. It also requires the insurer to provide a written summary of the objectives, scope, and results of the review and on-site audit, including a corrective action plan to address any deficiencies that are found.

- **Inspection of the TPA's Place of Business.** Requires the on-site audit to include an inspection of the TPA's place of business and to verify the accuracy, integrity, and completeness of the information received during a review.
- **Report in Lieu of Certification.** Requires insurers that did not have any administrative agreements with TPAs during the reporting year to submit a report (instead of a certification), which must include specific information that is defined in the regulation.

Idaho Legislature Modifies TPA Statutes

In March 2010, the Idaho Legislature replaced its former TPA statutes by enacting a new law that became effective (retroactively) on February 1, 2010. This new law, among other things:

- Adds a requirement that the insurer obtain approval from the Idaho Insurance Department for all advertising utilized by a TPA.
- Eliminates the former requirement that the TPA file a copy of written administrative services agreements with the Idaho Insurance Department.
- Requires written administrative services agreements to provide for the TPA to render periodic accountings to the insurer detailing all transactions performed by the TPA pertaining to the insurer's business.
- Adds a requirement for the TPA to disclose to the insurer all compensation received from all services in connection with the provision of administrative services for the insurer, including any compensation paid by reinsurers.
- Requires the TPA to file an annual report with the Idaho Insurance Department by July 1 of each year.
- Requires TPAs to report to the Idaho Insurance Department: (1) within 30 days after final disposition, any administrative action taken

against the TPA by another governmental agency in Idaho or in any other jurisdiction; or (2) within 30 days of the initial pretrial hearing date, any criminal prosecution of the administrator or any individual responsible for the TPA's affairs taken in any jurisdiction.

Oklahoma Amends TPA Annual Reporting Requirements

In May 2010, an omnibus bill was passed by the Oklahoma Legislature that contains several provisions related to insurance. Among many other provisions, the bill eliminated the requirement that TPA annual reports be *prepared* by an independent certified public accountant, and now simply requires that the report be *reviewed* by an independent certified public accountant. This bill becomes effective November 1, 2010.

Recent Amendments to Colorado's Unfair Claims Practices Law

Although Colorado is one of the few states that does not specifically require TPAs to be licensed or registered, a recent amendment to its unfair trade practices law affects insurers who were in TPAs in the State. Effective May 17, 2010, the Colorado Legislature amended its law concerning unfair or deceptive insurance claim settlement practices by making it an unfair compensation practice to base compensation of claims employees or contracted claims personnel, including performance bonuses or incentives, on: (1) the number of policies canceled; (2) the number of times coverage is denied; (3) the use of a quota limiting or restricting the number or volume of claims; or (4) the use of an arbitrary quota or cap limiting or restricting the amount of claims payments without due consideration of the merits of the claim.

Reimbursement of Over-the-Counter Drugs: A Prescribed Solution?

On September 3, 2010, the Internal Revenue Service released Notice 2010-59 regarding the reimbursement of over-the-counter medicines and drugs from health flexible spending arrangements (health FSAs), health reimbursement arrangements (HRAs), health savings accounts (HSAs), and Archer Medical Savings Accounts (Archer MSAs) effective January 1, 2011.

The IRS Notice further explains, and provides guidance regarding, certain legal mandates set forth under the Patient Protection and Affordable Care Act (the Act), which added a new section to the Internal Revenue Code (the Code) and revised the definition of “medical expenses” for employer-provided accident and health plans, including health FSAs, HRAs, HSAs, and Archer MSAs. Under the Code’s new section and the most recent IRS Notice, distributions from health FSAs, HRAs, HSAs, and Archer MSAs will not be able to reimburse the cost of over-the-counter medicines or drugs unless they are prescribed by a physician. Following are key points to consider:

- The new rules are effective January 1, 2011, even if a plan is not on a calendar year plan year.
- Insulin and items for medical care that are not medicines or drugs, such as bandages, crutches, and diagnostic devices such as blood sugar test kits, are not affected by the new rules.
- Under the new rules, an individual may be reimbursed for any prescribed over-the-counter drug costs if the individual provides the prescription (or a copy of the prescription or other documentation that a prescription has been issued) and the customer receipt to substantiate the purchase.
- The new rules do not affect the reimbursement of over-the-counter drugs purchased in 2010, even if the drugs are not reimbursed until 2011 (so amounts paid during an existing “grace period” after the end of 2010 will still be allowed

if incurred during 2010). However, over-the-counter drug expenses incurred and paid for in 2011 (even if the employer’s plan has a “grace period”) may no longer be reimbursed on or after January 1, 2011 unless they meet the physician prescription exception described above.

- Although many employers allow the use of debit card systems in conjunction with their health FSAs, HSAs or HRAs, because current debit card systems are not capable of recognizing or substantiating that over-the-counter drugs were prescribed by a physician at the point of purchase, most debit cards will no longer accept over-the-counter medicines or drugs as a reimbursable expenditure on or after January 1, 2011. As we have seen before, the debit card industry will likely develop an acceptable solution for this issue that meets applicable IRS guidelines, but until then, the ability to utilize FSA, HSA or HRA debit cards to purchase over-the-counter drugs will be limited.

What You Need To Do Now

- Any cafeteria plan that allows reimbursement of over-the-counter drug costs must be amended no later than June 30, 2011 to bring the plan into compliance with the new rules.
- As part of the plan amendment analysis process, employers may also want to evaluate whether existing “grace period” provisions may need to be amended to ensure compliance with the over-the-counter drug limitations, including the impact of any claims incurred and paid in 2011 under the employer’s “grace period” extension.
- Debit card and other claim substantiation rules may also need to be revised to ensure compliance with short-term and long-term impact of physician prescription standards for over-the-counter medications.

For More Information, Contact:

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Third Party Administrator Compliance and Regulatory Services

Polsinelli Shughart PC is pleased to offer its Third Party Administrator Compliance and Regulatory Services to TPAs and insurers. Services provided to TPAs and insurers include, but are not limited to:

- TPA licensing and registration with state insurance departments on a multi-state or national basis in the 41 states that license or register TPAs.
- Assist TPAs and insurers with on-site audits and operational reviews.
- Assist TPAs responding to regulatory investigations or regulatory actions.
- Assist TPAs with annual license/registration renewals and reports.
- Review of Administrative Service Agreements for compliance with state laws.
- Assistance with Market Conduct Examinations.
- Assist TPAs with foreign qualifications with Secretaries of State.

Polsinelli Shughart's Insurance Business and Regulatory Law group has experience representing third party administrators on a variety of compliance and regulatory issues on both a state and national basis. Attorneys in our group include a former state director of insurance, two members who were formerly general counsel at state insurance departments, as well as three members who were formerly in-house counsel for third party administrators.

The Third Party Administrator Update is a source of general information concerning third party administrators. Polsinelli Shughart PC provides this material for informational purposes only. The material provided herein is general and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

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