

Third Party Administrator Update

TPA LICENSING AND COMPLIANCE DEVELOPMENTS

In This Issue

New Law Regulating Health Care Benefit Managers in Washington State 1

Multistate Regulatory Action a Significant Reminder that Insurers Must Only Conduct Business with Licensed TPAs 3

New Pharmacy Benefit Manager Law in North Carolina..... 3

Vermont Issues Proposed Regulation Adopting Licensing and Regulatory Requirements for TPAs..... 4

New TPA Law Governing Workers' Compensation in Washington State..... 5

Third Party Administrator Licensing and Compliance Services..... 6

New Law Regulating Health Care Benefit Managers in Washington State

We have previously reported on the new law that became effective this past summer in Washington requiring TPAs that administer self-funded workers' compensation to become licensed with the Washington Department of Labor. However, Washington has enacted another law governing Health Care Benefit Managers ("HCBMs"), effective January 1, 2022, codified at Wash. Rev. Code §§ 48.200.010 *et seq.* The law requires HCBMs to become registered with the Washington Office of Insurance Regulation ("OIC"). The purpose of the new law is to regulate entities not currently subject to regulation that act as intermediaries between health carriers, health care providers, and consumers and that are involved in making health care decisions on behalf of health carriers. The OIC has recently adopted regulations to implement the new law. See Wash. Admin. Code §§ 284-180-110 *et seq.*

The term "HCBM" is defined in the new Washington law in section 48.200.020(4)(a) as:

[A] person or entity providing services to, or acting on behalf of, a health carrier or employee benefits programs, that directly or indirectly impacts the determination or utilization of benefits for, or patients access to, health

CONTINUED ON PAGE 2 ▶

POLSINELLI'S THIRD PARTY ADMINISTRATOR LICENSING AND COMPLIANCE SERVICES TEAM



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care services, drugs, and supplies including but not limited to the following services:

- Prior authorization or preauthorization of benefits or care.
- Certification of benefits or care.
- Medical necessity determinations.
- Utilization Review.
- Benefit determinations.
- Claims processing and repricing for services and procedures.
- Outcome management.
- Provider credentialing and re-credentialing.
- Payment or authorization of payment to providers and facilities for services or procedures.
- Dispute resolution, grievances or appeals relating to determinations or utilization of benefits.
- Provider network management.
- Disease management.

The new Washington law requires Pharmacy Benefit Managers (“PBMs”), who were previously required to register as PBMs, to now become registered as HCBMs instead. Additionally, the new law applies to TPAs that provide services such as claims processing, repricing, or benefit determinations for health carriers in Washington. The law does not apply to TPAs that administer life benefits or that only collect and remit premium. Prior to the enactment of this law, Washington was one of only a few states having no requirements to license or regulate TPAs.

Entities providing services to “employee benefit programs” are also subject to the new law. However, the statutory definition of employee benefit programs is limited only to programs under the state’s public employees’ benefits board or the school employees’ benefits board. Pursuant to the regulations, the law does not apply to service providers for self-insured health plans under ERISA. Wash. Admin. Code § 284-180-120.

Under the new law, health carriers and employee benefit programs are strictly “responsible for the compliance of any person or organization acting directly or indirectly on behalf of or at the direction of the carrier or program, or acting pursuant to carrier standards or requirements concerning the coverage of, payment for, or provision of health care benefits, services, drugs and supplies.” Wash. Rev. Code § 48.200.050(5)(b). Health carriers are also responsible for an HCBM’s violations of the new law, and carriers are subject to fines for an HCBM’s acts under their contract with a HCBM. If an HCBM violates any or laws or regulations pertaining to HCBMs, the OIC is permitted to place an HCBM on probation, suspend or revoke the registration, issue a Cease and Desist Order, levy a fine up to \$5,000 per violation, or require corrective action. Carriers must file all contracts and contract amendments entered into with an HCBM with the OIC within 30 days following the effective date of the contract or amendment.

To obtain an HCBM application, a request must be submitted with the OIC for an HCBM. Once the OIC’s staff reviews the information in the request, the OIC will send an email that will include instructions to log onto the OIC’s online system and pay the required \$200 fee.

For more information on the new HCBM registration requirement in Washington, please feel free to contact one of the authors.

Multistate Regulatory Action a Significant Reminder that Insurers Must Only Conduct Business with Licensed TPAs

A life and health insurer recently reached a settlement agreement with thirty-nine (39) state insurance departments following a targeted multistate market conduct examination (“Multistate Examination”). The Multistate Examination focused on the insurer’s Life, Accident, Health and Disability business in several areas of operation, including its oversight of Third-Party Contractors and claims handling. The insurance departments of Delaware, Michigan, Pennsylvania, South Carolina, and Texas (the “Lead States”) led the Multistate Examination.

The Multistate Examination resulted in a Regulatory Settlement Agreement (“Settlement Agreement”) in which the insurer was required to make a \$5,000,000 penalty payment to be divided among all participating states. In addition to the Lead States, thirty-four (34) other state insurance departments agreed to participate in the Settlement Agreement.

In addition to the \$5,000,000 payment, the Settlement Agreement also required that the insurer take certain corrective actions as part of adopting a Compliance Plan. Some of the items in the Compliance Plan included the following:

- The insurer was required to make a Market Conduct Compliance Manual available to all Third-Party Contractors and to enforce compliance with its terms and procedures.
- The insurer had to ensure that all contracts with its Third-Party Contractors complied with state insurance laws.
- The insurer had to ensure that Third-Party Contractors it is doing business with are properly licensed as required by state insurance laws.
- The insurer had to provide documentation to the Lead States verifying that it has conducted compliance audits of its Third-Party Contractors.
- The insurer had to review its claims payments for accuracy and timeliness and also ensure that its claims handling procedures and those of its Third-Party Contractors adhere to the claims handling requirements of state insurance laws.

While there were multiple issues involved in this multistate regulatory action, it resulted in a significant monetary penalty and action by thirty-nine (39) state insurance departments. The matter is a cautionary and costly reminder that insurers must only conduct business with Third Party Administrators (“TPAs”) that are properly licensed in all required jurisdictions and that insurers must also ensure their Third Party Administrator (“TPA”) business partners are in compliance with state insurance laws.

New Pharmacy Benefit Manager Law in North Carolina

North Carolina Governor Roy Hooper recently signed legislation that will impose tighter regulations on pharmacy benefit managers (“PBMs”) and require PBMs to obtain a license to do business in North Carolina. North Carolina Senate Bill 257, entitled “The Medication Cost Transparency Act” (the “Act”) took effect on October 1, 2021. PBMs are defined under the Act as “an entity who contracts with a pharmacy on behalf of an insurer or third party administrator to administer or manage prescription drug benefits to perform any of the following functions: (1) Negotiating rebates with manufacturers of drugs; (2) Processing claims for prescription drugs or medical supplies; or (3) Paying pharmacies or pharmacists for prescription drugs or medical supplies.”

The Act blocks surprise fees and allows pharmacies to refuse to fill prescriptions if they believe the prescription is not in the patient’s best interest. The Act also bans PBMs from preventing pharmacies from dispensing any drug and from retaliating against pharmacies.

CONTINUED ON PAGE 4 ▶

◀ CONTINUED FROM PAGE 3 | NEW PHARMACY BENEFIT MANAGER LAW IN NORTH CAROLINA

The Act also requires PBMs to apply for and obtain a license from the Commissioner of the North Carolina Insurance Department (“Department”). The initial application fee for a PBM license in North Carolina will be \$2,000, and annual renewal fees will be \$1,500. Under the Act, the Department may examine the affairs of any PBM to determine if the PBM is in compliance with the Act. PBMs in violation of the Act may be subject to monetary penalties assessed by the Department, and the Department may also petition a court to order PBMs to pay restitution to pharmacies if they are in violation of the Act. The Act also provides that the Department shall adopt rules establishing the licensing and reporting requirements for PBMs.

The Department has not yet posted any information on its website related to obtaining a PBM license in North Carolina. We will continue to monitor licensing and reporting requirements promulgated by the Department.

Vermont Issues Proposed Regulation Adopting Licensing and Regulatory Requirements for TPAs

In the fall of 2019, we reported that Vermont enacted Senate Bill 41, which granted the Commissioner of the Vermont Department of Financial Regulation (the “Department”) jurisdiction over entities that administer one or more health reimbursement arrangements (“HRAs”), health savings accounts (“HSAs”), and flexible spending accounts (“FSAs”). Senate Bill 41 directed the Department to adopt rules regulating entities that administer HRAs, HSAs, and FSAs.

In response to Senate Bill 41, the Department recently issued proposed Regulation 1-2021-01 (the “Regulation”) entitled “The Third Party Administrator Rule,” which sets forth licensing and regulatory requirements for TPAs operating in Vermont. Many of the provisions in the Regulation are similar to provisions in the NAIC’s Model Third Party Administrator Act (the “Model Act”). The Department ultimately adopted the Regulation and it is set to become effective on July 1, 2022.

One notable provision in the Regulation is that while Senate Bill 41 granted the Department jurisdiction over entities that administer HRAs, HSAs, and FSAs, the Regulation defines the terms “Third Party Administrator” and “TPA” to include an individual or entity who directly or indirectly underwrites, collects charges, collateral or premiums or adjusts or settles claims on Vermont residents in connection with life, annuity, health or stop-loss coverage, including HRAs, HSAs, and FSAs, or similar tax advantaged accounts for health related expenses.

The Regulation also provides that an individual or entity seeking to operate as a TPA in Vermont must first obtain a resident or non-resident TPA license (as applicable) by filing the NAIC Uniform Application for Third Party Administrators with the Department and providing certain documents and information with the application. The required attachments for a resident TPA license application are:

1. All basic organizational documents of the applicant.
2. An NAIC Biographical Affidavit for each individual who is responsible for the conduct of the affairs of the applicant.
3. Audited annual financial statements for the two (2) most recent fiscal years proving that the applicant has a positive net worth. Alternative rules apply for applicants that have been in existence for less than two (2) fiscal years.
4. A business plan including information on the applicant’s staffing levels, proposed business activities and capability to provide a sufficient number of experienced and qualified personnel in the areas of claims processing, record keeping and underwriting.

CONTINUED ON PAGE 5 ▶

◀ CONTINUED FROM PAGE 4 | VERMONT ISSUES PROPOSED REGULATION ADOPTING LICENSING AND REGULATORY REQUIREMENTS FOR TPAS

For non-resident TPA applications, the applicant must submit as an attachment to the application a letter of certification from the insurance regulatory agency in the applicant's home state verifying that the applicant is licensed and in good standing as a TPA in its home state. The Regulation also states that, to be eligible for a non-resident TPA license, the applicant must hold a home state TPA license from a state that has adopted the Model Act or enacted TPA laws containing provisions that are substantially similar to those in the Regulation.

The Regulation grants the Department authority to issue cease and desist orders and impose fines on individuals or entities that act as a TPA in Vermont without a TPA license.

New TPA Law Governing Workers' Compensation in Washington State

Washington has recently adopted legislation (Substitute House Bill 2409 that established Revised Code of Washington 51.14.179) that will impose new licensing and other regulatory requirements on workers' compensation Third Party Administrators ("TPAs") that contract with one or more self-insured employers to handle their claims. Specifically, effective July 1, 2021, all TPAs administering workers' compensation business for self-insured employers must be licensed by the Washington State Department of Labor and Industries ("Washington DLI"). Per the Washington DLI, such self-insured employers have used TPAs for a long time in Washington, but this is the first time there will be a requirement to obtain a TPA license.

To become eligible for a TPA license with the Washington DLI, a business entity must:

- Be licensed to conduct business in Washington by holding a business license from the Washington Department of Revenue.
- Demonstrate to the Washington DLI's satisfaction that it can meet the requirement for handling claims under Washington's laws.
- Comply with the reporting requirements for TPAs under Washington law.
- Provide a list of the self-insured employers in Washington for which the TPA is under contract to handle claims.
- Provide a list of the TPA's certified claims administrators. Claims administrators are the individuals managing the claims for the self-insured employers.
- Historically in Washington, only one claims administrator at each location was required to be certified by the Washington DLI. Effective July 1, 2021, all claims administrators will need to be certified or in the process of becoming certified.
- The process to become certified as a claims administrator is outlined in the Washington Administrative Code and includes having a certain amount of experience in the administration or oversight of workers' compensation claims or completion of a training program or curriculum and also includes taking a certification test with the Washington DLI.

According to the Washington DLI, if a TPA did not obtain a TPA license by July 1, 2021, it will not be authorized to manage workers' compensation claims for self-insured employers in the state of Washington.

Third Party Administrator Licensing and Compliance Services

Polsinelli's Third Party Administrator Team has significant experience representing TPAs on a national basis regarding a variety of business and compliance issues. The group includes attorneys who were formerly in-house counsel for TPAs, as well as attorneys who were formerly insurance regulators and members of the Federation of Regulatory Counsel.

Polsinelli's experience in the third party administrator industry is demonstrated by these representative examples:

- National and multi-state TPA licensing projects.
- Advise clients regarding business, regulatory and compliance matters associated with mergers, acquisitions and divestitures involving entities licensed as a TPA.
- Assistance with investigations, market conduct examinations and formal regulatory actions brought by state insurance departments.
- Negotiate and draft Administrative Services Agreements and subcontracts, including assistance with statutorily-mandated provisions and best practice business provisions.
- Assistance in developing a TPA Regulatory Addendum designed to comply with the statutorily-mandated provisions applicable under the TPA laws on a national basis.
- Monitor regulatory and legislative activity affecting our TPA clients and provide periodic reports regarding such activity.
- Maintain licensure as a TPA, PBM, Adjuster, Insurance Producer, or Service Company through periodic renewal and annual report filings.
- Assistance with ancillary state filing and registration requirements such as All-Payer Claims Databases and Vaccination Assessments.

To learn more about Polsinelli's **Third Party Administrator Licensing and Compliance Services** practice, or to contact a member of the Third Party Administrator Licensing and Compliance Services team, visit polsinelli.com/industries/third-party-administrator-tpa-licensing-and-compliance-services.

Polsinelli's Third Party Administrator Licensing and Compliance Services Team



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CONTINUED ON PAGE 7 ▶

◀ CONTINUED FROM PAGE 6 | POLSINELLI'S THIRD PARTY ADMINISTRATOR LICENSING AND COMPLIANCE SERVICES TEAM

- Polsinelli's TPA team provides TPA licensing services, TPA regulatory and compliance services, drafting and negotiation of administrative services agreements and a number of other TPA services.
- By leveraging its extensive experience representing TPAs, our TPA team helps clients avoid the learning curve and related cost implications that can be experienced by working with companies or attorneys who are less familiar with the regulatory and compliance needs of TPAs.

For questions regarding this information, please contact one of the authors, a member of Polsinelli's Third Party Administrator Licensing and Compliance Services practice, or your Polsinelli attorney.

For More Information or To Subscribe

For questions regarding this alert or to learn more about how it may impact your business, please contact one of the authors, a member of our Third Party Administrator Licensing and Compliance Services practice, or your Polsinelli attorney.

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