

THIRD PARTY ADMINISTRATOR UPDATE

Third Party Administrator Regulatory and Legislative Developments

December 2015

Inside This Issue

1 State Insurance Regulators Take Action Against Unlicensed Third Party Administrators

2 New State Cybersecurity Laws and Requirements in the Insurance Industry

2 New Oregon Law on Confidential Communication Requests

3 New Licensing and Regulatory Requirements for Pharmacy Benefit Managers in Ohio

4 Third Party Administrator Licensing and Compliance Services

For additional information about our Third Party Administrator Licensing and Compliance Services or the contents of this TPA update, please contact:



Steve Imber
(913) 234-7469
simber@polsinelli.com



Jennifer Osborn Nix
(913) 234-7472
josborn@polsinelli.com



Justin Liby
(913) 234-7427
jliby@polsinelli.com

State Insurance Regulators Take Action Against Unlicensed Third Party Administrators

By Steve Imber, Justin Liby, and Jennifer Osborn Nix

Recently, two state insurance departments took action against third party administrators (TPAs) operating in their respective states based on their failure to be properly licensed as a TPA. These regulatory actions against unlicensed TPA activity demonstrate the importance for TPAs to be properly licensed, as well as for insurance companies to confirm that the TPAs they are contracted with are duly licensed as a TPA.

The details of these actions are summarized below.

Tennessee Regulatory Action

According to the Tennessee Insurance Department (“Department”), on or about August 26, 2014, the unlicensed TPA company entered into a contract with an insurer to provide TPA services in the State of Tennessee.

The Department determined the TPA company earned revenues totaling \$142,500 from providing TPA services to the insurer in Tennessee in 2014, and an additional \$342,162 revenues in 2015.

As a result of the above, the TPA company entered into a Consent Order with the Department, in which it was ordered that:

- The TPA company would cease and desist from conducting unlicensed third party administrator services in the State of Tennessee until it obtained an administrator license in Tennessee.
- The TPA company shall pay civil penalties in the amount of \$20,000.
- All persons in any way assisting, aiding, or helping the TPA company operate as an unlicensed TPA shall cease and desist from all such activities in violation of Tennessee insurance law.

North Dakota Regulatory Action

The North Dakota Insurance Department (“Department”) recently entered into a Consent Order with an unlicensed TPA company. According to the Department, the TPA company did not have a current TPA license, and its previous North Dakota TPA license had expired in May of 2012.

The Department conducted an investigation and determined that the TPA company acted as a TPA for 94,537 insureds in North Dakota without having a valid TPA license in the state.

Pursuant to the Consent Order between the TPA company and the Department, it was ordered that:

- The TPA company agreed to comply with the prohibition against acting as a TPA in the state without a valid North Dakota TPA Certificate of Authority.
- The TPA company agreed to pay a \$40,000 monetary penalty to the Department.

New State Cybersecurity Laws and Requirements in the Insurance Industry

By Daniel Farris, Steve Imber, and Jennifer Osborn Nix

Recent high profile data breaches involving large, prominent insurers have caused state insurance regulators to ramp up efforts related to cybersecurity issues. These breaches have impacted tens of millions of individuals at a time, and resulted in multi-state market conduct examinations with each examination involving 50-plus jurisdictions.

These multi-state market conduct examinations typically focus on:

- Cybersecurity aspects of the breaches;
- The companies' responses to the breaches and any corrective action taken; and
- The financial impact of the breaches on consumers, providers and the companies.

The National Association of Insurance Commissioners Cybersecurity Task Force recently adopted Principles of Effective Cybersecurity Insurance Regulatory Guidance ("Cybersecurity Guidance Document") consisting of 12 principles for effective insurance regulation of cybersecurity risks. The 12 Principles apply to all licensees possessing personally identifiable consumer information including insurers, TPAs, and insurance producers.

In addition to the Cybersecurity Guidance Document, data security laws have recently been enacted in Connecticut, Oregon, Washington, and Rhode Island. These new laws create new duties to report data breaches, amend or address encryption

or require implementation of a comprehensive information security program. In Connecticut, the requirement to implement a comprehensive information security program also specifically applies to TPAs and Utilization Review Organizations.

Polsinelli's Insurance and Privacy and Data Security practices include attorneys specializing in cybersecurity and other privacy and data security issues, as well as attorneys who were formerly insurance regulators. We can help companies create effective cybersecurity programs, including but not limited to:

- Developing a cybersecurity testing plan;
- Monitoring and providing advice regarding state and federal cybersecurity laws;
- Developing a breach response plan; and
- Modifying existing contracts/agreements to address cybersecurity issues and requirements.

New Oregon Law on Confidential Communication Requests

By Justin Liby

House Bill 2758 was recently adopted in Oregon governing confidential communications among health care payers, group policyholders, certificate holders, and enrollees going forward. Section 2 of the Bill (House Bill 2758) requires Carriers and TPAs doing business in Oregon to adopt a procedure allowing any enrollee to send a request to the Carrier or TPA asking the Carrier or TPA to send all confidential communications directly to the enrollee and to refrain from sending confidential communications concerning the enrollee to the policyholder or certificate holder (defined by the Bill as a "confidential communication request"). The Bill requires the Oregon Department of Consumer and Business Services ("DCBS") to work with stakeholders and consumer groups to develop and make available to the public a standardized form that an enrollee may use to make a confidential communication request. Carriers and TPAs are required to allow enrollees to use the standardized form to make confidential communication requests and may also allow enrollees to make such requests by other means such as telephone or Internet. Confidential communication requests must be acted upon and implemented by the Carrier or TPA not later than seven days after receipt of an electronic request or 30 days after receipt of a hard copy request. Carriers and TPAs may not require an enrollee to waive any right to limit confidential communications as a condition of eligibility for or

coverage under a health benefit plan.

The Bill permits an enrollee who has made a confidential communication request to appeal any adverse benefit determination regarding a health care claim, but in order for the policyholder or certificate holder to appeal such a determination when the enrollee has a confidential communication request in effect, the enrollee must sign an authorization to disclose claims information relevant to the appeal to the policyholder or certificate holder.

The Bill was adopted and took effect as an emergency measure on June 18, 2015; however, the new laws regarding confidential communication requests apply to health benefit plans issued or renewed on or after January 1, 2016.

On September 15, 2015, the DCBS adopted temporary regulations (Oregon Administrative Rule 836-053-0600) to implement the confidential communication requirements under the Bill. The temporary regulations apply with respect to health benefit plans issued or renewed on or after January 1, 2016.

The regulations require Carriers and TPAs to (i) allow enrollees to use the standardized confidential communication request form and (ii) acknowledge receipt of the enrollee's Request Form and respond to the enrollee's request. Carriers and TPA's are also required to communicate with health care providers about the protections afforded to enrollees to have protected health information redirected. The regulations call for the standardized confidential communication request form to be posted on a website maintained by the Insurance Division of the DCBS.

IMPORTANT AND TIME SENSITIVE REPORTING

REQUIREMENTS: The regulations require Carriers and TPA's to report certain baseline and other data regarding confidential communication requests to the DCBS **not later than December 1, 2015**. The 2015 report must include (i) the internal and external education/outreach activities the Carrier or TPA will conduct to inform Oregonians about their rights to have protected health information redirected and (ii) certain baseline data for the period of October 1, 2014 through September 30, 2015, regarding confidential communication requests and confidential communication related grievances received by the Carrier or TPA. On November 10, 2015, the DCBS published a notice regarding the 2015 report, including a link to a template report form.

Carriers and TPAs will need to submit a second report not later than September 1, 2016. The 2016 report must include (i) baseline data for the period from January 1, 2016 through June 30, 2016 and (ii) information to assist the DCBS to determine the extent and effectiveness of the Carrier's or TPA's education/outreach activities including an explanation of how and when the process was presented to enrollees and copies of outreach/educational materials used during this time period.

New Licensing and Regulatory Requirements for Pharmacy Benefit Managers in Ohio

By Steve Imber, Justin Liby, Jennifer Osborn Nix, and Robert Weinberg

House Bill 64 recently amended Ohio Revised Code Chapter (ORC) 3959. The relevant code sections amended by House Bill 64 are ORC 3959.111 and ORC 3959.12 and these changes took effect on September 29, 2015.

Pursuant to these changes, Pharmacy Benefit Managers (PBMs) must now be in compliance with the following requirements in Ohio:

- PBMs must obtain and maintain a TPA license.
- PBMs must provide their contracted pharmacies current pricing information on Maximum Allowable Cost (MAC).
- PBMs must provide pharmacies access to an appeals process.
- PBMs must disclose to plan sponsors if using multiple MAC pricing lists.

It is important to note that House Bill 64 also expands the Ohio Insurance Department's authority to impose penalties on TPAs for specified violations of law.

Per the Ohio Insurance Department, current TPA licensees are not required to take any action to address expansion of the TPA licensing requirement to PBM until the regular renewal date of June 30, 2016.

Ohio is just one of a growing number of states in recent years which statutorily require PBMs to be licensed as TPAs in their respective states.

Third Party Administrator Licensing and Compliance Services

Polsinelli's Insurance Business and Regulatory group has significant experience representing third party administrators (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. Additionally, several of our attorneys are also members of the Federation of Regulatory Counsel.

Our experience in the third party administrator industry is demonstrated by these representative examples:

- National and multi-state TPA licensing projects, including off-shore entities located in India and the Philippines seeking licensure as a TPA in the United States.
- National and multi-state Pharmacy Benefit Manager (PBM), Adjuster and Insurance Producer licensing projects.
- Multi-state Service Company licensing projects involving the administration of workers' compensation coverage.
- Maintaining licensure as a TPA, PBM, Adjuster, Insurance Producer, or Service Company through periodic renewal and annual report filing.
- Assistance with ancillary state filing and registration requirements such as All-Payer Claims Databases and Vaccination Assessments.
- Advised clients regarding business, regulatory and compliance matters associated with mergers, acquisitions, and divestures involving entities licensed as a TPA.
- Multi-state research regarding the statutory exemptions to the TPA licensing and regulatory requirements.
- National research regarding the reviews and on-site audits insurers are required to perform with respect to their TPA business partners.
- Research and analysis regarding exemptions to the TPA licensing and regulatory requirements.
- Assistance with questions and issues that arise under The Employee Retirement Income Security Act (ERISA), The Health Insurance Portability and Accountability Act (HIPAA), and The Patient Protection and Affordable Care Act (ACA).
- Monitor regulatory and legislative activity affecting our TPA clients and provided periodic reports regarding such activity.
- Negotiate and draft Administrative Services Agreements and subcontract, including assistance with statutorily-mandated provisions and 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.
- Assistance with inquiries and formal regulatory actions brought by state insurance departments and attorney general offices.
- Attend industry meetings, including meetings held by the National Association of Insurance Commissioners (NAIC), National Conference of Insurance Legislators (NCOIL), Insurance Regulatory Examiners Society (IRES), Association of Insurance Compliance Professionals (AICP), and Securities & Insurance Licensing Association (SILA).

Polsinelli's Insurance Business and Regulatory group stays apprised of TPA industry trends and emerging TPA regulatory and compliance issues, publishes a newsletter and distributes e-Alerts that are solely dedicated to the TPA industry. To subscribe to future TPA updates and E-Alerts by email, please contact us at TPA@polsinelli.com.

To subscribe to future TPA newsletters and alerts by email, please email TPA@polsinelli.com

To learn more about our TPA practice, services and attorneys, please visit www.polsinelli.com/industries/third-party-administrators

Polsinelli provides material for informational purposes only. The material provided herein is general and is not intended to be legal advice. The choice of a lawyer is an important decision and should not be based solely upon advertisements.

Copyright © 2015 Polsinelli PC.