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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

TPA Agreement Filing and Compliance Requirements

By Steve Imber, Justin Liby, and Jennifer Osborn Nix

The NAIC Model Third Party Administrator Act, and nearly every state that has enacted laws regulating TPAs' administrative service agreements, requires such agreements to comply with the following:

- The TPA shall not act without a written agreement between a TPA and the insurer.
- The written agreement must contain all the provisions required by state TPA laws.
- The written agreement must be retained as part of the official records of both the insurer and the TPA for the duration of the agreement and for a prescribed number of years thereafter.

While almost every state that has enacted TPA laws imposes the above requirements pertaining to administrative service agreements, there are a number of states that also have affirmative requirements to file the agreements with state insurance regulators or report the existence of such agreements to the regulators within prescribed time periods. To assist our TPA and insurer clients comply with all the TPA laws under the state insurance codes, we have created a national regulatory addendum, which contains the mandated statutory provisions. The national regulatory addendum is available on a flat-fee basis. For more information regarding our national regulatory addendum, please contact the authors. Additionally, below are some representative examples of the affirmative requirements to file the written agreements with state insurance regulators or report the existence of such agreements to the regulators:

Nevada

Pursuant to Nev. Admin. Code § 683A.1215, TPAs must provide the Nevada Division of Insurance a copy of each agreement the TPA enters into with an insurer within 90 days after the effective date of the agreement. The Nevada Division of Insurance has recently been following up with TPAs to confirm that the Division has received copies of each agreement the TPA has listed in its Annual Report.

Tennessee

Pursuant to Tenn. Code § 56-6-402, TPAs must file each administrative service agreement with the Tennessee Insurance Department for its review and approval prior to the agreement being utilized in Tennessee.

Florida

Pursuant to a signed affidavit submitted with a TPA's application to the Florida Office of Insurance Regulation, a TPA agrees that they will submit all administrative agreements within 30 days of execution for the first year after licensure as a TPA in Florida.

Louisiana

Pursuant to La. Stat. § 22:1651, entering into a TPA service agreement is a material change requiring a TPA to submit notice to the Louisiana Insurance Department within 60 days.

Minnesota

Minn. R. 2767.0700 requires TPAs to notify the Minnesota Insurance Department within 30 days of signing a new TPA service agreement.

For More Information

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

Regulatory Actions Against Unlicensed TPAs

By Steve Imber, Justin Liby, and Jennifer Osborn Nix

South Dakota Regulatory Action

Recently, the South Dakota Division of Insurance took action against a TPA operating in South Dakota based on its failure to be properly licensed as a TPA.

According to the South Dakota Division of Insurance (Division), the unlicensed TPA acted as a TPA and a pharmacy benefits manager in South Dakota without being licensed in violation of SDCL §§ 58-29D-21 and 58-29E-2.

As a result, the TPA entered into a Consent Order with the Division on May 25, 2016, in which it was ordered that the TPA agreed to pay a \$12,500 monetary penalty.

In our last Third Party Administrator Update newsletter, we reported regulatory actions taken against two unlicensed TPAs in Tennessee and North Dakota. The details of these two actions are summarized below.

Tennessee Regulatory Action

The TPA entered into a Consent Order with the Tennessee Insurance Department that ordered:

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

North Dakota Regulatory Action

Pursuant to the Consent Order between the TPA and the North Dakota Insurance Department, it was ordered that:

- The TPA 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 agreed to pay a \$40,000 monetary penalty to the North Dakota Insurance Department.

Proposed New Jersey Assembly Bill 3427

By Steve Imber and Justin Liby

Legislation was recently introduced in New Jersey that would amend existing law regarding the licensing and registration of TPAs in the state. Pursuant to New Jersey Assembly Bill No. 3427, if the New Jersey Commissioner of Banking and Insurance suspends or revokes a license or registration of a TPA, the New Jersey Commissioner shall, within 30 days of the suspension or revocation of the TPA license, provide written notification of the suspension or revocation to all of the TPA's benefit payers with which the TPA had a contract in effect during the preceding calendar year, as listed in the most recent annual report filed with the New Jersey Department by the TPA. The legislation has yet to be adopted.

Louisiana Insurance Department Directive 208

By Steve Imber and Justin Liby

The Louisiana Insurance Department issued Directive 208 on May 9, 2016. Per the Directive, Louisiana Commissioner of Insurance James Donelon stated:

“It has come to my attention that various health insurance issuers, health maintenance organizations, group self-insurers, and third party administrators (which by law includes pharmacy benefit managers) are substantially out of compliance with provisions of Louisiana law that impose various fees that partially finance the Louisiana Medicaid Program. The purpose of Directive 208 is to confirm applicability of the fees, particularly La. R.S. 46:2625(A)(1)(c), which authorizes a 10 cent per prescription fee on every out-patient prescription filled by a pharmacy in this state and by certain out-of-state pharmacies.”

The Directive further states that all regulated entities (including TPAs) are directed to bring their business practices into compliance with Directive 208 and the failure to do so “may result in the highest sanctions permissible by law.”

California Division of Workers' Compensation Takes Action Against TPAs and Will Increase Audits of TPAs in 2016

By Steve Imber, Justin Liby, and Jennifer Osborn Nix

The Audit and Enforcement Unit of the California Division of Workers' Compensation (DWC) issued a press release recently indicating it will be conducting more target audits in 2016 to address utilization review (UR) complaints.

Under California law, all claims administrators are required to have a UR program governed by written policies and procedures, must utilize a medical director, and medical decisions that modify or deny a request for treatment must be made by a reviewing physician.

The DWC's press release reminded claims administrators that the penalty for not responding to a request for authorization is \$1,000 for each prospective review, and if a non-physician delays, denies or modifies a treatment request, there is a \$25,000 penalty. The DWC advised claims administrators to review UR timeframes with their staff and utilization review organizations to ensure proper UR timeframes are met.

According to a recent article published by Business Insurance, the DWC also recently sought to assess large monetary penalties against several TPAs for allegedly failing to provide medical records in a timely manner for independent medical reviews. Specifically, the DWC recently issued orders to show cause against several TPAs, and the details of these orders are summarized below.

- One TPA was assessed penalties of \$3.53 million for allegedly failing to provide medical records for 705 independent medical reviews within 15 calendar days of receiving notice from a company that conducts independent medical reviews.
- Another TPA was issued penalties of \$1.21 million for 242 alleged violations.
- A third TPA was assessed \$940,000 for 188 alleged violations.

Texas Department of Insurance Takes Action Against Companies For Utilization Review Non-Compliance

By Steve Imber and Jennifer Osborn Nix

In 2015, the Texas Department of Insurance (TDI) took action against a number of companies for their failure to be properly licensed as a utilization review agent in Texas, as well as for their failure to comply with other Texas utilization review requirements. The details of these actions are summarized below.

These regulatory actions against unlicensed utilization review activity demonstrate the importance for utilization review organizations to be properly licensed in Texas and in other states requiring utilization review licensure, as well as for insurance companies to confirm that the utilization review entities they are contracted with are duly licensed as utilization review agents in Texas and in other required states.

Pursuant to a Consent Order dated January 15, 2015, the TDI found that a company that had held a utilization review certificate in Texas had allowed its utilization review agent certificate to expire and yet the company continued to perform utilization review for various insurers in Texas. The TDI also found these insurers delegated utilization review to the company even when it did not hold an active utilization review agent certificate in violation of Texas law.

The TDI also determined that the insurer failed to:

- Issue initial adverse determinations within the required timeframes.
- Afford the provider with a reasonable opportunity to discuss the requested health care services prior to issuing an adverse determination.
- Include in its initial adverse determination letters a description of the source of the screening criteria it used to make the determination.
- Include in its appeal acknowledgement letter:
 - o The date that the URA received the appeal.
 - o A list of the documents that the appealing party must submit for review when the approved template included this notice element.

As a result, the TDI ordered the insurer to pay an administrative penalty of \$30,000.

Pursuant to a Consent Order dated July 2, 2015, the TDI found that a TPA licensed by the TDI failed to hold a utilization review agent Certificate of Registration in Texas.

In addition to finding that the TPA conducted utilization review without a utilization review agent Certificate of Registration, the TDI also found that the TPA:

- Violated Texas Ins. Code § 4201.152 and 28 Texas Admin. Code § 19.2015 because the utilization review was not conducted under the direction of a licensed physician.
- Denied medical doctor office visits on the grounds that the visits were not medically necessary, which violated Texas Ins. Code § 4201.153(d) and 28 Texas Admin. Code § 19.2005 because the adverse determinations were not made by a medical doctor or chiropractor, as applicable.
- Violated Texas Ins. Code § 4201.252, Texas Lab. Code §§ 408.0043 and 408.0045, and 28 Texas Admin. Code §§ 19.2006 and 180.22(g) because the adjuster who performed the retrospective review of the medical doctor office visits was not appropriately licensed, trained, and qualified to make adverse determinations.
- Violated Texas Ins. Code § 4201.206 and 28 Texas Admin. Code § 19.2011 because the TPA issued medical necessity denials without first giving providers a reasonable opportunity to discuss with a medical doctor the clinical basis for the denials.

Consequently, the TDI ordered the TPA to cease and desist from performing utilization review without a utilization review agent Certificate of Registration and to pay an administrative penalty of \$18,000.

Pursuant to a Consent Order dated February 5, 2015, the TDI reviewed an insurance company's utilization review agent registration renewal application and found deficiencies in the insurer's utilization review policies and adverse determination templates.

As a result, the TDI ordered the insurer and its utilization review clients to immediately comply with Texas utilization review laws and found the company and its clients jointly and severally liable to pay an administrative penalty of \$60,000.

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.
 - Negotiate and draft Administrative Services Agreements and subcontracts, 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.
 - Monitor regulatory and legislative activity affecting our TPA clients and provided periodic reports regarding such activity.
 - Maintaining 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.
 - 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.
 - 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).
 - 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), and Association of Insurance Compliance Professionals (AICP).

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

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