



WEST VIRGINIA INSURANCE BULLETIN No. 22-03

Insurance Bulletins are issued when the Commissioner renders formal opinions, guidance or expectations on matters or issues, explains how new statutes or rules will be implemented or applied, or advises of interpretation or application of existing statutes or rules.

► Pharmacy Reimbursement Effective January 1, 2022 ◀

During the 2021 Legislative Session, the West Virginia Legislature passed House Bill 2263, which amended West Virginia's Pharmacy Benefit Manager (PBM) regulator and licensure laws, located generally in Chapter 33, Article 51 of the West Virginia Code. Some of the substantive updates to the law regard pharmacy reimbursement requirements. The West Virginia Offices of the Insurance Commissioner (OIC) is issuing this Insurance Bulletin to provide guidance and educate stakeholders regarding the new PBM law concerning pharmacy reimbursement and the potential implications regarding enforcement.

Effective January 1, 2022:

- A PBM may not reimburse a pharmacy or pharmacist for a prescription drug or pharmacy service in an amount less than the ***national average drug acquisition cost*** (NADAC) for the prescription drug or pharmacy service at the time the drug is administered or dispensed, ***plus a professional dispensing fee of \$10.49***. See W.Va. Code §33-51-9(f). "NADAC" means the monthly survey of retail pharmacies conducted by the federal Centers for Medicare and Medicaid Services (CMS) to determine average acquisition cost for Medicaid covered outpatient drugs. See W.Va. Code §33-51-3.
- If the NADAC is not available at the time a drug is administered or dispensed, a PBM may not reimburse in an amount less than the wholesale acquisition cost of the drug, as defined in 42 U.S.C. §1395w-3a(c)(6)(B), plus a professional dispensing fee of \$10.49. See W.Va. Code §33-51-9(f).
- A PBM may not reimburse a pharmacy or pharmacist for a prescription drug or pharmacy service in an amount less than the amount the PBM reimburses itself or an ***affiliate*** for the same prescription drug or pharmacy service. See W.Va. Code §33-51-9(g). "Affiliate" means a pharmacy, pharmacist, or pharmacy technician which, either directly or indirectly through one or more intermediaries, has an investment or ownership interest in a PBM, or shares common ownership with a PBM, or has an investor or ownership interest holder which is a PBM. See W.Va. Code §33-51-3.
- The OIC may order reimbursement to an insured, pharmacy, or dispenser who has incurred a monetary loss as a result of a violation of Chapter 33, Article 51, or legislative rules implemented pursuant thereto. See W.Va. Code §33-51-9(h) and W.Va. Code St. Rules §114-99-1 *et seq.*

Of note, NADAC prices are updated on both a weekly and monthly basis. However, because W.Va. Code §33-51-3 specifically defines the NADAC price as the monthly survey price, PBMs should utilize the monthly

NADAC report to determine the reimbursement required to a pharmacy or pharmacist for a prescription drug at the time the drug is administered or dispensed.

Additionally, a PBM may not:

- Discriminate in reimbursement, assess any fees or adjustments, or exclude a pharmacy from the PBM's network on the basis that the pharmacy dispenses drugs subject to an agreement under 42 U.S.C. §256b. *See* W.Va. Code §33-55-9(j)(1).
- Engage in any practice that:
 - Bases pharmacy reimbursement for a drug on patient outcomes, scores, or metrics. Of note, this does not prohibit pharmacy reimbursement for pharmacy care, including dispensing fees from being based on patient outcomes, scores, or metrics so long as the patient outcomes, scores, or metrics are disclosed to and agreed to by the pharmacy in advance.
 - Includes imposing a point-of-sale fee or retroactive fee. A "retroactive fee" means all or a portion of a drug reimbursement to a pharmacy or other dispenser recouped or reduced following adjudication of a claim for any reason, except as otherwise permissible in Chapter 33, Article 51 of the West Virginia Code. *See* W.Va. Code §33-51-3.
 - Derives any revenue from a pharmacy or insured in connection with performing pharmacy benefits management services; however, this prohibition may not be construed to prohibit PBMs from receiving deductibles or copayments.
- Penalize a pharmacy, a pharmacist, or a pharmacy technician for providing a covered individual with information related to lower cost alternatives and cost share, or for selling a lower cost alternative to a covered individual, if one is available, without using a health insurance policy. *See* W.Va. Code §33-51-9(a).
- Collect from a pharmacy, a pharmacist, or a pharmacy technician a cost share charged to a covered individual that exceeds the total submitted charges by the pharmacy or pharmacist to the PBM. *See* W.Va. Code §33-51-9(b).
- Reimburse the 340B entity for pharmacy-dispensed drugs at a rate lower than that paid for the same drug to pharmacies similar in prescription volume that are not 340B entities, and shall not assess any fee, charge-back, or other adjustment upon the 340B entity on the basis that the 340B entity participates in the program set forth in 42 U.S.C. §256b. *See* W.Va. Code §33-51-9(d).

Pursuant to W.Va. Code §33-51-9(c), a PBM may only directly or indirectly charge or hold a pharmacy, pharmacist, or pharmacy technician responsible for a fee related to the adjudication of a claim if:

- The total amount of the fee is identified, reported, and specifically explained for each line item on the remittance advice of the adjudicated claim; or
- The total amount of the fee is apparent at the point of sale and not adjusted between the point of sale and the issuance of the remittance advice.

The provisions of W.Va. Code §§33-51-8 and 33-51-9, regarding licensure and regulation of PBMs, specifically regarding pharmacy reimbursement, apply to the coverage of prescription drugs under a plan that is subject to the Employee Retirement Income Security Act of 1974 (ERISA). Prior to the effective date of the 2021 amendments, W.Va. Code §§33-51-8 and 33-51-9 contained exemptions for PBMs that provided

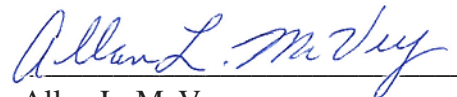
coverage of prescription drugs under an ERISA plan. However, the ERISA exemptions were expressly removed from W.Va. Code §§33-51-8 and 33-51-9 in House Bill 2263 by the West Virginia Legislature in 2021, after the United States Supreme Court's decision in *Rutledge v. Pharmaceutical Care Management Assn.*, 891 F. 3d 1109 (2020). In essence, state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage are not pre-empted by ERISA. The *Rutledge* Court specified that state laws mandating a particular pricing methodology for pharmacy benefits are considered to be the regulation of reimbursement rates and are, therefore, not pre-empted by ERISA. As such, West Virginia's PBM pharmacy reimbursement laws are cost regulation laws and are not summarily pre-empted by ERISA. Accordingly, without a specific ERISA plan exemption in state law, West Virginia's PBM pharmacy reimbursement laws are applicable to PBMs that administer ERISA plans and must be followed by PBMs for all plans, both insured and ERISA.

As noted, the OIC may order reimbursement to an insured, pharmacy, or dispenser who has incurred a monetary loss as a result of a violation of Chapter 33, Article 51 of the West Virginia Code. See W.Va. Code §33-51-9(g) and W.Va. Code St. Rules §114-99-1 *et seq.* In addition to reimbursement, a PBM may be subject to licensure suspension, revocation, audit or examination and/or monetary penalties for violations of Chapter 33, Article 51 of the West Virginia Code. See W.Va. Code St. Rules §114-99-1 *et seq.* A PBM facing regulatory enforcement action may seek a hearing before the OIC pursuant to W.Va. Code §33-2-13.

You may contact the OIC's Consumer Services Division at 1-888-TRY-WVIC (1-888-879-9842) or OICConsumerServices@wv.gov for assistance or to file a complaint regarding PBM reimbursement. You may also contact the OIC's Legal Division at OICLegal@wv.gov or Health Policy Division at OICHealthPolicy@wv.gov.

Please e-mail any questions concerning this Insurance Bulletin to OICBulletins@wv.gov.

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