



WEST VIRGINIA INSURANCE BULLETIN No. 21 - 07

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.

► Specialty Drug Networks ◀

West Virginia Code § 33-51-8(d)(1) currently provides that “[a] pharmacy benefit manager’s network shall be reasonably adequate, shall provide for convenient patient access to pharmacies within a reasonable distance from a patient’s residence ***and shall not be comprised only of mail-order benefits but must have a mix of mail-order benefits and physical stores in this state.***” (emphasis added). This code section was amended in 2021 by the West Virginia Legislature to its current language. However, since 2019, W.Va. Code § 33-51-8(d)(1) has provided that “[a] pharmacy benefit manager’s network shall not be comprised only of mail-order benefits but must have a mix of mail-order benefits and physical stores in this state.” Additionally, 114 C.S.R. 99, § 6.1, as promulgated in 2020, states:

A PBM shall maintain an adequate and accessible network for the provision of prescription drugs for a health benefit plan. The network shall provide for convenient patient access to pharmacies within a reasonable distance from a patient’s residence. ***A network shall not be comprised only of mail-order benefits but must have a mix of mail-order benefits and physical stores in this state.*** (emphasis added).

“Network,” as defined in both W.Va. Code § 33-51-3 and 114 C.S.R. 99, § 2.7, “means a pharmacy or group of pharmacies that agree to provide prescription services to covered individuals on behalf of a covered entity or group of covered entities in exchange for payment for its services by a pharmacy benefits manager or pharmacy services administration organization. The term includes a pharmacy that generally dispenses outpatient prescriptions to covered individuals or dispenses particular types of prescriptions, provides pharmacy services to particular types of covered individuals or dispenses prescriptions in particular health care settings, including networks of specialty, institutional or long-term care facilities.”

Additionally, W.Va. Code §§ 33-16-3q, 33-24-7h, 33-25-8f, 33-25A-8g, all enacted in 2003, generally provide that an insurer issuing a group accident and sickness policy, a Hospital, Medical, Dental or Health Service Corporation, a Health Care Corporation, or a Health Maintenance Organization (“HMO”) may not require any covered person to obtain prescription drugs from a mail-order pharmacy in order to obtain prescription drug benefits, and may not violate this prohibition by using an agent, contractor or administrator that requires the covered person to obtain prescription drugs from a mail-order pharmacy.

It has recently come to the attention of the Insurance Commissioner that some health benefit plans, or health insurers, and pharmacy benefit managers (“PBM”) have separate, sub-networks for specialty drugs that

consist solely of mail-order pharmacies. In these instances, the health benefit plan or PBM will have physical stores in-network that a covered individual may use to fill most prescription drugs, but the health benefit plan or PBM will not permit a covered individual to obtain specialty drugs at those same physical, in-network pharmacies regardless of whether the pharmacy can dispense the specialty drug. Instead, covered individuals are required to order specialty drugs from a mail-order specialty pharmacy, which oftentimes delays receipt of the necessary medication. It is the opinion of the Insurance Commissioner that these restricted, sub-networks for specialty drugs that solely consist of mail-order pharmacies violate the network adequacy requirements of W.Va. Code § 33-51-8 and 114 C.S.R. 99, § 6.1, and may also violate W.Va. Code §§ 33-16-3q, 33-24-7h, 33-25-8f, or 33-25A-8g, as applicable.

Additionally, W.Va. Code § 33-51-11, which specifically provides freedom of consumer choice for pharmacy benefits, was enacted during the 2021 Legislative Session and becomes effective for policies, contracts, plans, or agreements that are delivered, executed, amended, adjusted, or renewed on or after January 1, 2022. Pursuant to W.Va. Code § 33-51-11(a), a health benefit plan or PBM may not:

- Prohibit or limit any covered individual from selecting a pharmacy or pharmacist of his or her choice who has agreed to participate in the plan according to the terms offered by the insurer;
- Deny a pharmacy or pharmacist the right to participate as a contract provider under the policy or plan if the pharmacy or pharmacist agrees to provide pharmacy services, including, but not limited to, prescription drugs, that meet the terms and requirements set forth by the insurer under the policy or plan and agrees to the terms of reimbursement set forth by the insurer;
- Impose upon a beneficiary of pharmacy services under a health benefit plan any copayment, fee, or condition that is not equally imposed upon all beneficiaries in the same benefit category, class, or copayment level under the health benefit plan when receiving services from a contract provider;
- Impose a monetary advantage or penalty (which includes a higher copayment, a reduction in reimbursement for services, or promotion of one participating pharmacy over another by these methods) under a health benefit plan that would affect a beneficiary's choice among those pharmacies or pharmacists who have agreed to participate in the plan according to the terms offered by the insurer;
- Reduce allowable reimbursement for pharmacy services to a beneficiary under a health benefit plan because the beneficiary selects a pharmacy of his or her choice, so long as that pharmacy has enrolled with the health benefit plan under the terms offered to all pharmacies in the plan coverage area;
- ***Require a beneficiary, as a condition of payment or reimbursement, to purchase pharmacy services, including prescription drugs, exclusively through a mail-order pharmacy;***
- ***Impose upon a beneficiary any copayment, amount of reimbursement, number of days of a drug supply for which reimbursement will be allowed, or any other payment or condition relating to purchasing pharmacy services from any pharmacy, including prescription drugs, that is more costly or more restrictive than that which would be imposed upon the beneficiary if such services were purchased from a mail-order pharmacy or any other pharmacy that is willing to provide the same services or products for the same cost and copayment as any mail order service.***

While many subdivisions of W.Va. Code § 33-51-1(a) could be triggered by a health benefit plan or PBM's decision to have separate, sub-networks for specialty drugs that consist solely of mail-order pharmacies, the two provisions that are emphasized hereinabove are explicitly applicable to this practice.

Moreover, the Insurance Commissioner believes that the Legislature intended the newly enacted freedom of consumer choice for pharmacy provisions to be both far reaching and robustly enforced. W.Va. Code § 33-

51-1(e) provides that the freedom of consumer choice pharmacy provisions shall apply to all PBMs and health benefit plans providing pharmaceutical services benefits, including prescription drugs, to any resident of West Virginia. The Legislature further clarified that, for purposes of this code section, “health benefit plan” means any entity or program that provides reimbursement for pharmaceutical services, which would include PBMs that provide services to an ERISA plan, as well as PBMs that provide services for workers’ compensation insurance programs. Furthermore, W.Va. Code § 33-51-1(c) prohibits the Insurance Commissioner from approving the licensure of any PBM or approving any health benefit plan that does not conform to the freedom of consumer choice for pharmacy provisions. W.Va. Code § 33-51-1(d) gives covered individuals and pharmacies a direct legal cause of action for injunction against PBMs and health benefit plans that do not comply. Accordingly, should a specialty pharmacy meet the applicable terms and requirements, a health benefit plan or PBM must allow a covered individual to select that specialty pharmacy for the purchase of his or her prescription drugs, and allow that specialty pharmacy to participate in its network regardless of whether it is a mail-order pharmacy or physical store. The Insurance Commissioner will not approve health benefit plans that are filed with this agency if they restrict specialty drugs to mail-order pharmacies only.

Specialty drugs are used to treat complex, chronic conditions such as cancer, multiple sclerosis, organ transplants, or other rare diseases or conditions. Specialty drugs are oftentimes expensive, and may require special handling, provider coordination, and patient education for safe and effective use. The Insurance Commissioner recognizes the unique need for specialty pharmacies and the important role that they play in the healthcare delivery system. Any specialty pharmacy, whether a mail-order pharmacy or a physical retail store pharmacy, must have the skill, capability and personnel to provide the patient education and clinical support required, in addition to providing the unique storage and shipping requirements that the specialty drugs may require. However, pursuant to W.Va. Code §§ 33-51-8(d) and 33-51-11, patients must have a choice to procure prescription drugs from physical retail stores or mail-order pharmacies, and pursuant to W.Va. Code §§ 33-16-3q, 33-24-7h, 33-25-8f, 33-25A-8g, an insurer issuing a group accident and sickness policy, a Hospital, Medical, Dental or Health Service Corporation, a Health Care Corporation, or a HMO may not require any covered person to obtain prescription drugs from a mail-order pharmacy in order to obtain benefits. None of these provisions in the West Virginia Code afford a “carve-out” or exception for specialty drugs under which a PBM, health benefit plan, insurer issuing a group accident and sickness policy, Hospital, Medical, Dental or Health Service Corporation, Health Care Corporation, or HMO can deprive a covered individual of this choice. In that regard, the Insurance Commissioner believes that having a separate, sub-network for specialty drugs that solely consists of mail-order pharmacies is a violation of W.Va. Code §§ 33-51-8(d) and 33-51-11, as well as W.Va. Code §§ 33-16-3q, 33-24-7h, 33-25-8f, 33-25A-8g, as applicable, and would render a network inadequate for PBM licensing purposes and result in the denial or rejection of a health benefit plan filing.

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

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