



California Workers' Compensation Institute
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VIA E-MAIL to DWCForums@dir.ca.gov

Ms. Maureen Gray
Regulations Coordinator
Division of Workers' Compensation, Legal Unit
Department of Industrial Relations
Post Office Box 420603
San Francisco, CA 94142

Subject: Contracted Provision of Medicines -- Sections 9769.1. – 9769.4;
Employee Information -- Sections 9880, 9881;
Posting Notice -- DWC-7; and
Claim Form -- DWC-1 Notice of Potential Eligibility

Dear Ms. Gray:

These Forum comments on draft “contract provision of medicine” regulations and draft changes to notice requirements including new hire information, posting notice requirements, the DWC-7 posting notice, and the DWC-1 claim form notice of potential eligibility, are submitted on behalf of California Workers' Compensation Institute members.

Recommendation

The Institute respectfully recommends that the Division withdraw the draft contract provision of medicine regulations and the draft changes to notice requirements that are currently posted for comment on the DWC Forum page, and instead move forward with the pharmacy network standards language (attached) that was reviewed, discussed and supported by attendees of the Pharmacy Network Regulations Advisory Committee meeting on December 15th, 2009.

Discussion

The draft regulations and changes to notice requirement fail to meet the statutory purpose of Labor Code Section 4600.2 and go beyond what the statute requires. If adopted they will interfere with custom and practice, eliminating currently functioning PBMs and networks from workers' compensation in California and increasing medical costs and administrative expenses.

Will increase pharmacy costs and administrative expenses

According to DIR Director Duncan and Acting Administrative Director Nevans, the purpose of the DIR/DWC12-point plan is to “help control medical costs in California’s workers’ compensation system.” The 6th point on the plan states that “writing pharmacy network regulations will allow employers to contain pharmacy costs, which are rising at a higher rate than other medical costs.” Unfortunately the draft regulations and changes to notice requirements will not only fail to accomplish those goals, they threaten to reverse the contributions already made by PBMs and pharmacy networks towards containing pharmacy costs by adding many unnecessary requirements that will be costly to implement, will create multiple exceptions and exemptions, and will limit cost-saving opportunities.

Does not meet its primary statutory purpose

PBMs and pharmacy networks already play an important role in combating rising medical costs. The legislature recognized the value of PBMs and pharmacy networks in containing medical costs and sought to maximize that value by adopting Labor Code Section 4600.2, which requires injured employees to receive all their medicines and medical supplies in the manner prescribed in a PBM or pharmacy network contract that complies with standards adopted by the administrative director. The Legislature instructs the administrative director to “seek to reduce pharmaceutical costs” in adopting those contract standards, and that the standards must “provide for access to a pharmacy within a reasonable geographic distance from an injured employee’s residence.”

CWCI is not aware of any complaints that claims administrators using PBMs and pharmacy networks fail to provide injured employees with appropriate and timely notification, reasonable access to pharmacies, or that the participating pharmacies fail to provide medicines and medical supplies at no cost to the employee. The draft regulations and notice changes impose burdensome requirements, unrealistic contract standards, and other unnecessary constraints that will increase pharmaceutical costs, contrary to the express statutory purpose of reducing them.

PBMs and pharmacy networks have long been utilized nationally for the efficient provision of medicines in group health and other venues, and in California workers’ compensation they are currently operating efficiently and without complaint to help reduce pharmacy costs. The Institute believes that the DWC has the opportunity to build upon these successful efforts by setting standards that will: 1) ensure that they can continue without unnecessary encumbrance; 2) extend them to all injured employees; and 3) result in additional savings.

The proposed regulations are beyond the scope of the statute

Government Code section 11342.2 provides:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

The art of crafting proper regulations is to balance the need for specificity with sufficient latitude, so that the regulatory requirements neither impede activities permitted by the enabling statute nor expand the scope of the statute. Administrative regulations that

alter or amend the statute or enlarge or impair its scope are void, and courts not only may, but it is their obligation to strike down such regulations. Morris v. Williams (1967) 63 CR 689, 67 C2d 733, 433 P.2d 697.

The proposed regulations are excessive and overbroad to the extent that they alter the scope of section 4600.2 in a manner that is beyond the authority of the AD. The regulation imposes standards that go beyond the contract and attempt to regulate the structure and operation of the networks themselves. Section 4600.2 does not extend the authority of the Division to the regulation of networks.

In addition to requiring the administrative director to seek to reduce pharmaceutical costs, the statute only requires the contract standards to “provide for access to a pharmacy within a reasonable geographic distance from an injured employee’s residence.” The drafted regulations and changes to the required notices go far beyond this, however, and add conditions that are unnecessary and counter-productive, such as a geographic access standard determined by the availability of pharmacies that are open seven days a week.

Interferes with “custom and practice”

The proposed regulatory changes will interfere with the existing custom and practice of the PBMs and pharmacy networks that already play an integral part in the efficient and effective provision of medicines in California workers’ compensation. Even though there have been no reports of problems or complaints about PBMs and networks or their notices, the draft requirements would disrupt and, in many cases, disqualify currently functioning pharmacy networks that are now efficiently providing medicines and supplies to injured employees.

Thank you for considering these comments. Please contact me if further clarification would be helpful.

Sincerely,

Brenda Ramirez
Claims and Medical Director

BR/ja
Attachment *[Draft Pharmacy Network Standards language]*

cc: Carrie Nevans, DWC Acting Administrative Director
John Duncan, DIR Director
CWCi Claims Committee
CWCi Medical Care Committee
CWCi Legal Committee
CWCi Regular Members
CWCi Associate Members