Workers' Comp

Not All PBMs are Created Equally: Examining the Differences Between Traditional Health Care and Workers' Compensation PBM

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Over the last several years there has been a concerted effort in state legislatures to regulate the activities of Pharmacy Benefit Managers or PBMs. The focus has primarily been on the activities of PBMs in the commercial and government health space. However, workers' compensation PBMs are sometimes roped into those same laws, even though there is a vast difference between how traditional health care PBMs and workers' compensation PBMs operate. For example, in a traditional health care PBM program, there is pre-determined eligibility and a pre-determined benefit. In most cases the covered individual has to pay a co-pay or deductible as part of the transaction. Traditional health care PBMs develop formularies based on negotiations with drug manufacturers, rebate potential and the net cost of the drug to the plan. Traditional health care PBMs can restrict access to certain drugs by not placing them on their formulary or by placing them in a higher cost tier.

Workers' compensation PBMs are different. Injured employees are entitled to any necessary care required to cure their workplace injury or illness. There is no pre-defined benefit or eligibility. Benefits are determined by what is medically necessary to treat the injury or illness, and eligibility, or compensability, is determined based on whether or not the injury or illness is found to be work related. It is a much more complex system. In nearly every state, the injured employee bears no out-of-pocket cost for their medications. Several states have adopted drug formularies for their workers' compensation systems. In states where workers' compensation PBMs can develop and use formularies, those formularies are designed based on medications that are typically appropriate to treat a given workplace injury or sickness. But in every case, exceptions can be made to allow any drug to be prescribed that is deemed medically necessary. Injured employees have access to any FDA approved drug regardless of the state-mandated or PBM developed formulary. Workers' compensation pharmacy represents a very small percentage of the overall drug market (less than 4%) so consequently, workers' compensation PBMs have no ability or leverage to negotiate with drug manufacturers on pricing and don't (can't) use rebates or pricing to develop their formularies. Workers' compensation PBMs are in a highly competitive space. Their

reimbursement is negotiated with workers' compensation insurers, or self-insured employers or their third-party administrators. These market forces keep downward pressure on costs at the workers' compensation PBM level, while these same PBMs need to keep reimbursement to their contracted pharmacies at a level reasonable enough to keep them dispensing medications to injured employees. Most workers' compensation PBMs contract with 90-95% of the pharmacies in a given state. Access to care is critical to a successful pharmacy management program in workers' compensation cases. The provision of pharmacy care to injured employees is typically governed by a state agency charged with administering that state's workers' compensation program.

Nowhere has the difference between workers' compensation PBMs and the typical health care PBMs been more apparent than the recent rulemaking endeavor by the New York State Department of Financial Services. The recent rulemaking was designed to regulate the market conduct of PBMs in New York. The rule was comprehensive and targeted many practices that have been problematic in the typical health care PBM space. However, almost all of the market conduct provisions of the rule directly conflicted with rules promulgated by the New York State Workers' Compensation Board. Adoption of the rule would have put workers' compensation PBMs in a situation where they could not possibly comply with both sets of rules. It is often impossible to serve two masters, which was especially true in this case.

The Enlyte government affairs team met with the New York State Department of Financial Services and pointed out the multitude of conflicts between their rule and the rules adopted by the New York State Workers' Compensation Board. We also submitted comprehensive comments related to the conflicts. To their credit, the Department of Financial Services listened carefully to our concerns and thoroughly read our written comments. Based on our efforts and those of other stakeholders, the Department of Financial Services withdrew the rule and will begin a redraft to address stated concerns. We look forward to working with them on the redraft.

We recognize the need for regulation of our practices as a workers' compensation PBM. However, that regulation should come from the agency responsible for overseeing the workers' compensation system in that state. In the case of New York, that would be the New York State Workers' Compensation Board. The good news is many of the market conduct provisions in the Department of Financial Services proposed rule have already been addressed for workers' compensation PBMs by the Workers' Compensation Board rules. The other conflicts noted are created simply by the differences in how care is delivered and paid for in the workers' compensation system.

As states continue to regulate PBMs, state legislatures should examine the differences between traditional health care PBMs and workers' compensation PBMs, and exempt workers' compensation PBMs from the traditional PBM laws. If the state legislatures feel that the workers' compensation PBMs need additional regulation, we have drafted a model workers' compensation pharmacy management law that is specific to the needs of the workers' compensation system and specific to the business practices of workers' compensation PBMs. Not all PBMs are created equally, and the two systems each require their own unique set of laws and regulations.



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