State & Local Compliance Update
USI EMPLOYEE BENEFITS

October 9, 2024

Washington State PBM Law

Washington state recently passed E2SSB 5213 which further regulates Pharmacy Benefit Managers (“PBMs”) and Health Care Benefit Managers (“HCBMs” include PBMs) doing business in the state.

Unlike PBM laws passed in other states, the Washington law is clear that PBMs are not required to comply with E2SSB 5213 for self-funded ERISA group health plans *unless* that self-funded health plan opts into the protection of the law. This “opt-in” provision was likely added to the legislation to avoid ERISA preemption challenges that have occurred with respect to PBM laws in other states around the country.

Fully insured health plans and health plans offered to public employees are subject to these PBM requirements.

Under E2SSB 5213, a PBM may not:

- reimburse a network pharmacy an amount less than the contract price between the PBM and the third-party payor the PBM has contracted with to provide a pharmacy benefits plan or program;
- exclude a pharmacy from the network on the basis that the pharmacy is new, has only been open for a limited time, or has transferred locations, unless there is a pending investigation for fraud, waste, and abuse;
- reimburse a pharmacy or pharmacist an amount less than the amount the PBM would reimburse an affiliate for the same service
- require a covered person to pay more for a drug than the lesser of the applicable cost sharing for the drug or the amount the person would pay if buying the drug in cash; or
- require or coerce a covered person to use a pharmacy owned or affiliated with the PBM.

The law requires that PBMs must:

- apply the same fees, utilization review, and days allowance regardless of which participating pharmacy a covered person uses;
- permit the covered person to receive delivery or mail order of a medication through any network pharmacy that is not primarily engaged in dispensing prescription drugs to patients through the mail or common carrier; and

- for new prescriptions issued after January 1, 2026, receive affirmative authorization from a covered person before filling prescriptions through a mail order pharmacy.

In addition:

- **Registration process for PBMs and HCBMs.** All HCBMs, including PBMs, must register with the state's Office of Insurance Commissioner ("OIC") and meet other requirements.
- **Mail order.** If a covered person uses a mail-order pharmacy, the PBM must allow for dispensing at a local network pharmacy if the mail-order is delayed by more than one day after the expected delivery day provided by the mail-order pharmacy, or if the order arrives in an unusable condition. The PBM must also ensure that covered persons using a mail-order pharmacy have easy and timely access to prescription counseling by a pharmacist.
- **Pharmacy appeals process.** PBMs must establish a process by which a network pharmacy, or its representative, may appeal its reimbursement for a drug. A network pharmacy may appeal a reimbursement cost for a drug if the reimbursement for the drug is less than the net amount that the network pharmacy paid to the supplier of the drug.
- **No fee for network participation.** A PBM may not charge a pharmacy a fee related to credentialing, participation, certification, or enrollment in a network, and it may not condition or link restrictions on fees related to credentialing, participation, certification, or enrollment in a PBM's pharmacy network with a pharmacy's inclusion in the PBM's pharmacy network for other lines of business.
- **Retaliation prohibited.** A PBM may not retaliate against a pharmacy or pharmacist for disclosing information in court, an administrative hearing, legislative hearing, or to a law enforcement agency if the pharmacy or pharmacist has a good faith belief the information is evidence of a violation of a state or federal law, rule, or regulation.

These requirements apply to PBMs and HCBMs and become effective on January 1, 2026.

EMPLOYER NEXT STEPS

As much of the law appears to take effect January 1, 2026, PBMs will likely be making changes to their processes. The OIC is currently undergoing a ruling making process to further clarify these requirements.

Employers with an ERISA covered self-funded group health will need to determine whether to "opt-in" to the state protections. It will be important to discuss with the plan's third-party administrator and/or PBM to determine whether they will be able to comply with the requirements before making an opt-in election. The OIC is likely to establish a process for making an "opt-in" election in future guidance or rulemaking.

RESOURCES

- For a copy of the bill and a summary visit https://app.leg.wa.gov/billsummary?BillNumber=5213&Year=2023&Initiative=false

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