



ADVISORY NO. 466

TOPIC: UPDATE ON THE STATUS OF PBMS AFTER JANUARY 1ST

On December 10, 2010, the Texas Attorney General issued an opinion regarding the status of pharmacy benefit managers after January 1, 2011. See FO&L Advisory 464 (December 10, 2010).

In that opinion, GA-0828, the AG concluded that “sections 408.027, 408.028, and 413.011 of the Texas Labor Code do not establish a minimum allowable rate at which workers’ compensation insurance carriers may pay for a prescription drug, medicine, or other remedy.” In addition, the AG determined that “a workers’ compensation insurance carrier may contract with a workers’ compensation health care network to obtain a contract with a health care provider to pay for a prescription drug, medicine, or other remedy at negotiated rates that are permitted by law.”

It has been generally recognized that the Attorney General’s opinion was hard to understand in light of the questions posed by the Division. Thus, the effect of the AG’s opinion on the continued viability of PBMs after January 1, 2011 has been difficult for the Division to measure.

Over the past week, agency staff members have consulted closely with system stakeholders and members of the legislature and their staffs in an effort to provide clear guidance to interested parties who may be preparing for the January 1, 2011 deadline. All parties seem to have focused their efforts on arriving at an interpretation of the AG’s opinion that is consistent with the workers’ compensation act and the Texas Workers’ Compensation Health Care Network Act.

Those efforts are ongoing and, according to our observations, have been conducted in good faith by all interested system stakeholders who have an interest in reaching a workable solution to the problem.

Many parties have expressed fear to us that the Division will fail to provide concrete guidance on this issue before the end of the year. We remain confident that the Division staff will offer system stakeholders clear guidance of the meaning and effect of the AG’s opinion, and that such direction will be provided to interested parties sooner, rather than later.

Moreover, we remain cautiously optimistic that the Division’s interpretation of existing law will

FLAHIVE, OGDEN & LATSON

uphold the continued use of pharmacy fee discounts after January 1, 2011, so long as such discounts are taken in a manner that is consistent with well-settled and existing practices.

Some people have speculated that the Division's guidance will not be publicly stated until the last moment. We believe, however, that the Division will offer written guidance to system stakeholders on how to handle pharmacy fee discounts in the very near future. Indeed, we expect the Division to make its opinions and recommendations available to the public generally no later than the end of day, December 17, 2010.

We are monitoring this issue on a constant basis and will keep you advised of any new developments that may occur as soon as they may occur. If you have questions regarding this issue, please contact Steve Tipton, James Sheffield or Bobby Stokes in our office.