December 3, 2021

New Washington State Partnership Access Lines Program (WAPAL) Funding Arrangement

Medical Coverage Assessments to Help Fund WAPAL

The WAPAL has been in operation for more than 10 years and currently consists of four different state-organized psychiatric assistance programs:

1. Partnership Access Line (PAL) – PAL supports primary care providers with questions about children's mental health care such as diagnostic clarification, medication adjustment or treatment planning.

2. Mental Health Referral Service for Children and Teens – This connects patients and families with available evidence-based outpatient mental health services in their community.

3. Perinatal Psychiatry Consultation Line for Providers (PAL for Moms) – PAL for Moms supports providers caring for patients with behavioral health disorders who are pregnant, postpartum, or planning pregnancy.

4. Psychiatry Consultation Line (PCL) – PCL provides 24/7 support to prescribing providers from primary care clinics, community hospitals, emergency departments, substance use treatment programs, evaluation and treatment programs and municipal and county jails caring for adult patients with mental health and/or substance use disorders.[1]

Washington enacted House Bill 2728 (the "Act") in 2020 to help fund these programs through a covered lives assessment on both fully insured and self-insured medical plans providing coverage to Washington residents. The Washington Health Care Authority (HCA) chose KidsVax as the third party administrator for the Act's reporting, assessment, and payment processes. This Alert addresses these quarterly processes for employer-sponsored health coverage.

Assessed Entities

The Act requires the following entities to report information to the HCA:

- Health insurance carriers for fully insured health plans;
- Employers or other entities that provide health care in Washington, including self-insured entities or employee welfare benefit plans; and
- Self-insured multiple employer welfare arrangements (MEWAs).[2]

This second bullet includes both in-state and out-of-state employers providing self-insured group health coverage to employees (or former employees) in Washington (but see ERISA Preemption).

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[1] https://www.hca.wa.gov/billers-providers-partners/behavioral-health-recovery/partnership-access-lines-pal

[2] https://www.wapalfund.org/faqs/, FAQ A1

A self-insured Indian tribal government plan is exempt as long as coverage is limited to members of the tribe. Plans covering non-tribal members and plans covering the employees of commercial activities on tribal land are not exempt. This Alert focuses on the implications for employer-sponsored medical coverage, but the insurance carriers for Medicaid managed contracts are also not assessed entities under the Act.

Covered Lives Assessment and Payment: The Act's reporting requirement applies to an employer that offers self-insured group health coverage, but the Act's covered lives assessment applies only to major medical plans. This means an employer may be an assessed entity subject to the Act's reporting requirements because it offers a health FSA and/or HRA to Washington residents, but it does not owe an assessment if it does not offer a self-insured medical plan. See A Gray Area for more information.

Covered Lives Assessment

The Act charges assessed entities a fee to support WAPAL programs based on their number of covered lives in major medical plan coverage each quarter (see A Gray Area). The fee is currently **$0.13 per covered life** and will be set before the end of October for each subsequent year (i.e., prior to October 2022 for 2023, etc.).

A "covered life" means any individual who lives in Washington for whom an assessed entity administers, provides, pays for, insures or covers health care services.[3] In other words, covered lives include all Washington residents who are covered employees (including their covered spouses and dependents), COBRA participants, and participants in retiree medical coverage.

Reporting and Payment

Responsible Parties

The responsible parties for reporting and payment (if required) under the Act are as follows:

- The insurance carrier is responsible for a fully insured health plan. Insurance carriers will likely pass any assessment fees for fully insured medical plans through to employers.
- The employer (or other plan sponsor) is responsible for a self-insured group health plan. It is possible to delegate reporting and advance payment with subsequent reimbursement to a third party administrator.
- The board of trustees is responsible for reporting and payment for a self-insured MEWA.

Due Dates

Covered lives reporting is due 45 days after the end of each quarter and officially began with the 3rd quarter of 2021, which was due by November 15, 2021. Deadlines occurring on the weekend advance to the next business day.

Calendar Quarter	Reporting Deadline
3rd Quarter 2021 (July – September)	November 15, 2021
4th Quarter 2021 (October – December)	February 14, 2022
1st Quarter 2022 (January – March)	May 16, 2022
2nd Quarter 2022 (April – June)	August 15, 2022

[3] https://www.wapalfund.org/faqs/, FAQ C1; but excluding Medicaid participants (see FAQ C2)

Calendar Quarter	Reporting Deadline
3rd Quarter 2022 (July – September)	November 14, 2022
4th Quarter 2022 (October – December)	February 14, 2023

Online Reporting

Baseline Report: KidsVax contacted assessed entities and required them to register and complete a baseline report by August 30, 2021. There was no financial assessment associated with this report or penalties for failing to file, and it partially served as a system test.

Self-Insured Medical Plan Coverage

An employer sponsoring a self-insured medical plan covering Washington residents must register and report its covered lives using the WAPAL Fund Self-Assessment Reporting System at https://assessments.wapalfund.org/ (the "Portal"). For each quarter, the Portal requires the employer to report its covered lives using three separate age bands as follows:

Payer ABC Company	FEIN 99-1234567	Qtr Q4	Year 2021	Totals
	October	November	December	Sum for Quarters
1. Ages 0 – 18	44	44	45	133
2. Age 19 – 64	97	97	100	294
3. Ages 65 and Older	4	5	5	14
4. Total sum, all months, all Ages				441
5. Applicable assessment rate				**$0.13**
6. Total assessment				$57.33
7. Total assessment due				**$57.33**

After confirming the data entered in the Portal is correct, the employer must press "Submit & Print" to complete reporting. This will generate:

- A Quarterly Report of Covered Lives and Assessment Payment (a summary for the entity's records); and
- A WAPAL Fund Remittance Form ("Remittance Form") for the appropriate quarter.

Once submitted, an employer may only correct an error by contacting Support@WAPALfund.org with an explanation of the mistake.

Other Health Coverage and Reporting Zero Covered Lives

An employer with zero covered lives for a quarter must still complete the quarterly report. Guidance from KidsVax indicates that the covered lives assessment applies only to "medical" benefits and expressly excludes separate dental and/or vision-only coverage. An entity that is subject to the Act solely due to dental and/or vision-only

coverage must report, but it should enter zeroes for covered lives assessment purposes.[4] The guidance does not address other types of health coverage. Based upon the literal wording of the Act and the available guidance, we believe an employer offering health FSA coverage and/or an HRA alongside a fully-insured medical plan should report, but it should not enter any covered lives for assessment purposes.

Example 1

An employer's medical coverage is fully insured, but the employer offers self-insured dental and/or vision coverage to its employees. Since the employer only reports covered lives for self-insured medical plan coverage, the employer should enter zeroes for the dental and/or vision participants. This will result in a completed report with no assessment.

Example 2

An employer's medical coverage is fully insured, but employees who enroll in the medical plan are also covered under the employer's HRA. Since the employer only reports covered lives for self-insured medical plan coverage, the employer should enter zeroes for the HRA participants. This will result in a completed report with no assessment.

There are options to file an Annual Zero Covered Lives Report or Permanent Zero Covered Lives Report, which only require annual or one-time reporting unless and until the employer's circumstances change. While there may be situations where an employer sponsoring a self-insured medical plan will be able to report zero covered lives for a quarter, this should be rare.

A Gray Area

The outcomes in Example 1 and 2 are intuitive, because the insurance carrier is already paying an assessment for the covered lives under the fully insured medical plan. The result in Example 2 would be similar if the health FSA or HRA participant is enrolled in another employer's self-insured medical coverage. The other employer would pay an assessment on the covered life under its self-insured medical plan.

The KidsVax guidance excluding dental and/or vision-only coverage supports the broader interpretation that there is no intent to assess multiple fees for the same covered life across different forms of health coverage. If the assessment were not limited to medical plan coverage, an employer sponsoring self-insured medical, dental, and health FSA coverage might be assessed three times for the same covered life without an anti-duplication or overlap rule, and no such rule exists in the Act or available guidance.

We asked KidsVax and the HCA to confirm whether an employer offering fully insured medical coverage with a health FSA and/or HRA must report and can use the zero covered lives approach,[5] but neither responded. We will update our material if and when we receive a reply. In the meantime, we recommend employers offering health FSAs and/or HRAs in Washington discuss this potential reporting obligation with their legal counsel.

Payment

Payment is due once the employer generates the Remittance Form, but entities have up to 30 days from this date to pay the assessment. Payment may be made by the following methods (all other correspondence may be made using the first two methods):

[4] https://www.wapalfund.org/faqs/, FAQ C3

[5] A general purpose health FSA or HRA can pay for medical expenses, but we do not believe Washington intends to assess these plans as "medical" benefits.

All FedEx, UPS, and Overnight Shipping	Regular Mail	All ACH/Wire Transfers
WAPAL Fund c/o KeyBank Lock-Box Operations Attn: Lock Box 941661 1109 Pacific Avenue Tacoma, WA 98402-4303	WAPAL Fund PO Box 94166 Seattle, WA 98124-6466 Checks payable to: WAPAL Fund	KeyBank ABA#: 125000574 Account#: 479681316952 Payer Name: _____ Payer Fed ID: _____ Indicate if payment includes multiple payers or invoices

The Taxpayer ID number for the WAPAL Fund is 91-1412780. An employer may obtain an IRS Form W-9 from the WAPAL Fund at www.WAPALfund.org/W9

Since the Act imposes the fee on employers sponsoring self-insured medical plans and not the plans themselves, we do not believe an employer sponsoring a self-insured ERISA medical plan can pay the fee using plan assets without violating ERISA's fiduciary and prohibited transaction rules. This means the employer should not attempt to include the estimated cost of the quarterly fees in the plan's premium equivalent rates, and it should not pay the fee out of the plan's trust assets. In most instances, the fees should be small relative to the size of the employer and this should not be a hardship. By contrast, the board of trustees for a MEWA should be able to pay the fee out of the MEWA's trust or other assets.

Advance payments by TPA: The plan asset limitation for a self-insured ERISA plan also means the employer should not use trust or other plan assets to reimburse a TPA that advances payment of the fee on behalf of the employer.

Enforcement

KidsVax does not enforce the Act and will report non-compliance to the HCA. The HCA has the authority to establish an interest charge for late payment and assess a civil penalty of up to 150% of the assessment fee to employers that fail to pay the fee within three months of the due date (not the end of the 30-day grace period).

ERISA Preemption

An ERISA plan may generally claim preemption from any state law that relates to it (i.e. affects it), such as a law requiring or prohibiting coverage for a particular service or treatment. However, ERISA does not preempt state laws regulating insurance [for fully insured coverage], banking, or securities. This is why state insurance law mandates or restrictions apply to fully insured ERISA coverage while self-insured ERISA plans can choose to ignore them.

The Act's assessment fee does not directly affect a self-insured ERISA plan's administration or terms of coverage, and it is not that different from other fees that have survived ERISA preemption, including New York's HCRA covered lives assessment or San Francisco's Health Care Security Ordinance. Claiming ERISA preemption will require one or more employers to survive a legal challenge in court (i.e., take one for the team). This may not be worth the effort or expense given the relatively small expense employers are likely to owe under the Act.

Out-of-State Insurers: Although outside the scope of this Alert and not an employer's problem, it will be interesting to see if insurance carriers with policies covering Washington residents but sitused in another state will claim an exemption from the Act.

Additional Resources

Washington State Health Care Authority WAPAL Website

Washington State Health Care Authority WAPAL FAQs

Additional WAPAL FAQs by KidsVax

How to Complete a Covered Lives Report

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