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TEXAS MEDICAL ASSOCIATION
Physicians Caring for Texans

TMA Frequently Asked Questions on Texas' "Gold-Carding" Preauthorization Exemption Law and Rules

TMA OFFICE OF THE GENERAL COUNSEL Oct. 17, 2022

1. What is a "gold card" under Texas law and Texas Department of Insurance (TDI) rules?

Under TDI rules (i.e., 28 TAC §19.1730(10)) a "gold card" or "preauthorization exemption" is "a privilege obtained [under Texas law and TDI rules] in which a physician or provider is not subject to a preauthorization requirement that otherwise applies with respect to a particular health care service. The preauthorization exemption applies both to care rendered by a treating physician or provider and to care ordered by a physician or provider who is acting in his or her capacity as a treating physician or provider."

2. Do I need to do anything to get an initial gold-card exemption?

Yes and no. A physician or provider qualifies for a preauthorization exemption (i.e., a "gold card") for a particular health care service if the insurer or HMO subject to Texas' gold-carding law approved at least 90% of the preauthorization requests submitted by the physician or provider for that service during a defined six-month evaluation period. Under TDI rules, to qualify for a preauthorization exemption an evaluation must be based on at least five "eligible preauthorization requests." For more information, see TMA FAQ 6.

The responsibility to conduct an evaluation of preauthorization request outcomes and provide notice of the issuance or denial of an exemption falls to the issuer. ***A physician or provider is not required to request an exemption to qualify for an exemption.***

3. When were initial gold-card exemption notices issued?

Issuers subject to Texas' new gold-carding law (House Bill 3459) were required to provide notice of an initial exemption (or denial of an exemption) by Oct. 1, 2022. These initial exemption determinations were required to be based on an evaluation period of Jan. 1, 2022, through June 30, 2022.

4. What issuers are subject to Texas' gold-carding law?

Texas' gold-carding law applies to HMOs and insurers subject to Insurance Code Chapter 4201, Subchapter N, including a utilization review agent or a person who contracts with an issuer to issue a preauthorization determination, or performs the gold-carding functions. See 28 TAC §19.1730(6) (definition of "issuers").

The HMOs and insurers subject to Insurance Code Chapter 4201, Subchapter N, include state-regulated HMOs and insurers in the commercial market (tip: look for "TDI" or "DOI" on the patient's insurance card to aid in determining if a plan is state-regulated). The health plans subject to HB 3459 are HMO, PPO, and EPO plans offered by TDI-regulated issuers in the commercial market.

In other words, the issuers it applies to cover about 20% of Texans. The law does not apply to Medicaid or the Children's Health Insurance Program. For more information on the issuers and health plans subject to HB 3459, see TDI FAQ on preauthorization exemptions under HB 3459 (questions on "Applicable health benefit plans").

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5. What health care services are potentially eligible for gold-card exemptions?

Texas' gold-carding law applies broadly to "health care services" as defined by Texas Insurance Code §843.002(13), which includes application to, among other things, prescription drugs. As TDI stated in the adoption order to the rules:

> The definition of 'health care services' in Insurance Code §843.002(13) includes medical care and care or services incidental to medical care. By extension, the definitions of 'medical care' in Insurance Code §843.002(19) and 'practicing medicine' under Occupations Code §151.002(13) provide additional specificity regarding the meaning of the term 'health care services.' Collectively, these definitions provide sufficient clarity that the term would include drugs, labs, imaging, and medical equipment and supplies ordered by a physician to diagnose, prevent, and 'treat a mental or physical disease or disorder or a physical deformity or injury by any system or method.'

However, recall that a gold-card exemption is issued by an issuer to a physician or provider for a particular health care service. TDI rules in 28 TAC §19.1730(7) define a "particular health care service" as "[a] health care service, including a prescription drug, that is subject to preauthorization ***as listed on the issuer's website*** under §19.1718(j) of this title (related to Preauthorization for Health Maintenance Organizations and Preferred Provider Benefit Plans)." (Emphasis added.) This TDI rule, which ties the definition of a "particular health care service" to the issuer's website, means that different plans may have different approaches to defining a service.

TDI's adoption order further specifies that "[i]f a preauthorization request includes more than one particular health care service, the outcome for each service must be counted separately for the purposes of an evaluation."

6. What is an initial gold-card exemption based on?

Under TDI rules, the approval rate to qualify is based on the outcomes of all "eligible preauthorization requests" for the particular health care service that are submitted by the physician or provider during the most recent six-month evaluation period and finalized prior to the evaluation (not including requests pending appeal at the time data are analyzed). Modified requests are counted based on any updated service requests. Outcomes for each service are counted individually. See §19.1730(3) and §19.1731(b).

7. How will I know I've been granted or denied a gold-card exemption?

Under TDI rules, it is the responsibility of the issuer to notify physicians and providers that they have been granted or denied a preauthorization exemption for those health care services for which the minimum threshold of five eligible requests for the evaluation period has been satisfied. A physician may specify a particular preferred email or mailing address for gold-card-related notices (e.g., notices of exemptions, denials, and recissions). See 28 TAC §19.1732(e).

TDI rules provide that "issuers must include an explanation of how the physician or provider may update their preferred contact information and delivery method on all communications issued under [28 TAC §19.1732] and on the website required under §19.1718(j) … (relating to Preauthorization for Health Maintenance Organizations and Preferred Provider Benefit Plans)."

Issuers must notify physicians and providers of initial preauthorization exemptions or denials by Oct. 1, 2022, following the initial evaluation period (Jan. 1-June 30, 2022) and two months following the end of subsequent evaluation periods.

Under 28 TAC §19.1732(b), a notice granting an exemption must include "a plain language explanation of the effect of the preauthorization exemption and any claim coding guidance needed to document the preauthorization exemption, consistent with §19.1731(e) … (relating to Preauthorization Exemption). The exemption begins on the date the notice is issued and must be in place for at least six months before it may be rescinded. If an issuer subsequently receives a preauthorization request from the physician or provider for a particular health care service for which an exemption has been granted, the issuer must provide a notice consistent with Insurance Code §4201.659(e)."

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8. Can I appeal if I was denied a gold-card exemption?

Under 28 TAC §19.1732(b), an issuer is required to provide notice to the physician or provider when a preauthorization exemption has been denied. Among the elements of that required notice are "a description of how to appeal the denial using the issuer's complaints and appeals processes; and information on how to file a complaint with [TDI]."

9. May a treating physician or provider rely on another physician's or provider's preauthorization exemption?

In 28 TAC §19.1731(d) and (e), TDI provides the following limitations on relying on preauthorization exemptions:

> (d) Other than care ordered by a treating physician or provider that has a preauthorization exemption that is then rendered by a physician or provider that does not have an exemption, a treating physician or provider may not rely on another physician's or provider's exemption. *If a treating physician or provider does not have a preauthorization exemption and relies on another physician's or provider's preauthorization exemption in violation of this subsection, an issuer may consider the physician or provider who has qualified for the preauthorization exemption as failing to substantially perform the health care service under Insurance Code §4201.659, concerning Effect of Preauthorization Exemption, and may reduce or deny payment for that service on that basis.* It is not a violation of this subsection for a provider, such as a nurse or physician's assistant, who practices under the supervision of a physician, to rely on the supervising physician's exemption, if the provider appropriately orders care and requests preauthorization under the supervising physician's NPI.
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> (e) For care ordered by a treating physician or provider that has a preauthorization exemption that is then rendered by a physician or provider that does not have an exemption, the treating physician or provider must include the name and NPI of the ordering physician or provider on the claim in fields 17 and 17B of CMS Form 1500, in fields 76-79 or another appropriate field in Form UB-04, or in the corresponding fields for electronic claims using the ASC X12N 836 format. The issuer may provide coding guidance to physicians and providers to ensure that this information is appropriately captured on the claim. *If this information is not included, the issuer may treat the claim as subject to an otherwise applicable preauthorization requirement.* (Emphasis added.)

10. Do I have to re-up my gold-card exemption?/How often do health plans re-up it?

An issuer may continue an exemption without evaluating whether the physician or provider qualifies for the exemption for a particular evaluation period. Exemptions must be in place for at least six months before issuers may rescind a physician's or provider's exemption after a retrospective review of claims from the next evaluation period. For more information on recissions, see 28 TAC §19.1732(d) (concerning recission notices), §19.1733 (concerning retrospective reviews and appeals of preauthorization exemptions), and §12.601 (concerning independent review of preauthorization exemptions).

11. May an issuer retroactively deny a health care service because an exemption was rescinded?

No. Texas Insurance Code §4201.657(b) expressly provides:

> (b) A health maintenance organization or insurer may not retroactively deny a health care service on the basis of a rescission of an exemption, even if the health maintenance organization's or insurer's determination to rescind the preauthorization exemption is affirmed by an independent review organization.

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12. Where can I find Texas' gold-carding law and rules?

The Texas gold-carding law is HB 3459.

TDI's gold-carding rules are located in (1) Division 2 of Subchapter R, Chapter 19, Part 1, Title 28 of the Texas Administrative Code, and (2) 28 TAC §12.601.

13. Are there any additional resources available on this topic from TDI?

Yes. TDI held a webinar on the preauthorization exemption process on Sept. 29, 2022. That webinar is available for viewing on demand, and the PowerPoint slides from the webinar are available on the TDI website. In addition, TDI has published this FAQ on preauthorization exemptions under HB 3459.