

PROTECTING CONSUMERS FROM UNFAIR AND DECEPTIVE TRADE PRACTICES

How Regulators and Legislators Can Use Unfair and Deceptive Trade Practice Laws to Protect Consumers from Alternative Funding Programs

For decades, state and federal legislators have recognized the importance of protecting the average consumer from business practices that are deceptive and misleading and that induce consumers into transactions or arrangements they otherwise would not have agreed to.

Alternative funding programs (AFPs), third-party programs that partner with employer sponsored health plans to alternatively source consumer's prescription drug benefits, engage in a variety of practices that may constitute unfair and/or deceptive trade practices under state and federal laws.

This resource is not legal advice.

As defined by the Federal Trade Commission¹

Unfair Trade Practice:

A practice is unfair when it (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers; and (3) is not outweighed by countervailing benefits to consumers or competition.²

Deceptive Trade Practice:

A practice is deceptive when (1) there is a material representation, omission, or practice that is likely to mislead the consumer; (2) when a consumer is acting reasonably; and (3) the consumer injury is likely because the consumer would have chosen differently but for the deception.

[Learn more about how AFPs work here](#)



AFP DECEPTIONS

While not all AFPs are the same, many AFPs operate by manipulating health plan design to automatically deny prior authorization for a set of prescribed specialty drugs. This tactic creates confusion over whether the targeted medications are covered or non-covered and effectively requires the patients who rely on those drugs to work with the AFP toward “alternative sourcing” of their medications.

Prior authorization is a customary requirement for accessing specialty drugs – but when AFPs are involved, the prior authorization process **by design** leads to a denial even though the medications are considered medically necessary. Consumers are told they cannot access their medications in the expected manner using their pharmacy benefit, and must instead work with a third party they've never previously heard of (the AFP vendor) to access their covered prescription drugs. Often, a series of deceptive communications ensues:

A. Employers, as informed by the AFP, tell employees their plan coverage has NOT CHANGED.

As part of the AFP sales pitch to employers, AFPs will often represent that plan beneficiaries won't experience changes in their medication access. Employers in turn inform plan participants that their benefits will continue unchanged, despite the involvement of the AFP – when, in fact, that is not true.

- During open enrollment, employees may rely on assurances provided by their employer and/or the AFP to stick with their existing health plan, believing that their medications are still covered by the plan. However, once the plan year starts and the employee discovers they no longer have straightforward coverage under their plan, the employee has almost no ability to switch to other coverage.
- Plans and AFPs may also withhold critical plan documents from employees – allowing AFPs to conceal and misrepresent the terms of the employee's coverage.

B. AFPs tell employees their medication is NOT COVERED. This is a misleading communication since, in fact, the plan does not EXCLUDE coverage for the medication but instead subjects targeted drug(s) to a prior authorization procedure that, by design, leads to an initial automatic denial. That denial triggers a deceptive process whereby:

- The AFP concedes that the employee's drug is medically necessary under the prior authorization process, but advises the employee that they can only access their medication by working with the AFP to source the drug via the manufacturer's PAP; otherwise, the employee will have to pay 100% of the medication's cost and it will not count towards their annual out-of-pocket limits.
- Employees experience confusion and anxiety about whether they have insurance coverage, and who the parties are that they must deal with to access their medication, with one survey finding that 88% of respondents required to work with an AFP found the experience stressful.³

C. AFPs tell employees the AFP is a “patient advocate” or “advocacy organization.” AFPs tell employees that the AFP is acting as a “patient advocate” and that it is in the employee’s interest to source the drug from the PAP. In fact, the AFP is acting in its own interest, seeking to earn a cost avoidance fee for shifting the costs associated with the employee’s prescription from the plan to the PAP.⁴

- Patient advocacy organizations are typically non-profit organizations that represent and support patients, caregivers, and providers, and educate health care stakeholders and policymakers about the condition and related care issues. Examples of well-known patient advocacy organizations include the American Cancer Society Cancer Action Network, the National Bleeding Disorders Foundation, and the National Association for Mental Illness (NAMI).
- AFPs in fact typically engage in multiple activities that are not in the best interest of the patient:
 - ▶ The AFP will attempt to source the patient’s medication by enrolling the patient into a PAP. To this end, the AFP may solicit or complete misleading application documents which depict the employee as un- or under-insured, e.g.:
 - The AFP may instruct the employee to fill out this paperwork, supplying answers that the employee either can’t attest to or knows to be false; or
 - The AFP may require the employee to execute a limited power of attorney, which authorizes the AFP to act on behalf of the employee when working to submit the patient’s PAP application and needed documentation; or
 - The AFP may even impersonate the employee, completing and submitting patient PAP applications without the employee’s knowledge or assent.
 - ▶ If the AFP is unsuccessful in enrolling the employee into the PAP, the AFP may:⁵
 - Lean on the employee or their health care provider to switch to a different medication made by a manufacturer with an easier-to-fool PAP; or
 - Source the employee’s medication from overseas, in violation of existing federal law.

HOW DO THESE PRACTICES HARM PATIENTS?

- ❗ AFPs subject patients to outright denials or, at minimum, harmful delays in accessing their medications (average: 68.2 days), leading to potentially dangerous interruptions to their treatment regimens.
- ❗ AFPs may deprive patients of access to the medical equipment they need to self-administer their medications (PAPs do not supply such ancillaries).
- ❗ AFPs may expose patients to medications illegally sourced from overseas that do not undergo the same oversight as FDA-approved drugs.
- ❗ Requiring consumers to source their prescription drug from outside their health insurance deprives patients of the benefit of their insurance coverage and their right to non-discriminatory coverage.
- ❗ Requiring consumers to import their prescription drugs from outside the United States exposes patients to unreasonable safety risks and unaffordable cost-sharing, 100% the cost of the medication if the PAP or international sourcing is unavailable.

In addition to misleading patients, AFPs also mislead and deceive employers and PAPs:

HOW AFPs DECEIVE EMPLOYERS

AFPs tell employers that their employees will experience no disruption or change in access to their medication from the employer's choice to implement an AFP. This is misleading as the process in which consumers access their medication changes materially when consumers are required to access their medication via the AFP.

AFPs suggests to employers that AFP operate in partnership with the manufacturer and its PAP. AFPs are not in partnership or working in coordination with pharmaceutical manufacturer PAPs. Many PAPs have expressly changed their terms and conditions to ensure commercially insured individuals cannot enroll in their programs when working with an AFP.

HOW AFPs DECEIVE PAPs

AFPs make insured individuals appear to be uninsured or under-insured. AFPs may understate applicants' household income, size, or other qualifying criteria to make the employee appear eligible for the PAP. PAPs have limited resources and are intended to be used for individuals without commercial insurance (pharmaceutical companies offer an entirely different set of financial assistance programs for individuals with commercial insurance). AFPs' exploitation of PAPs for patients with insurance results in pharmaceutical companies restricting the use of these programs, making it more difficult for those who actually need these resources to access them.

WHAT CAN WE DO?

Several authorities have the opportunity to regulate AFPs as unfair and/or deceptive trade practices. If you have had a negative experience with an AFP reach out to your State Attorney General or the Federal Trade Commission and ask them to use their authority to protect consumers from AFPs.

Have more questions
about AFPs or would like
help filing a complaint?
Contact Aimerd Alliance at
policy@aimedalliance.org

1. *The FTC defines unfair and deceptive as defined under the Federal Trade Commission Act ("FTC Act"). State law may be similar to, and interpreted similarly to the FTC Act, but it may not be identical.*
2. *FTC, Federal Trade Commission Act: Section 5: Unfair or Deceptive Acts or Practices, at p. 8, <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>*
3. *William B. Wong, et al., A descriptive survey of patient experiences and access to specialty medicines with alternative funding programs, (Oct. 29, 2024), <https://www.jmcp.org/doi/full/10.18553/jmcp.2024.30.11.1308>.*
4. *CancerCare, Response to Payer Matrix, (Aug. 17, 2023), https://media.cancercare.org/documents/344/original/Response-to-Payer-Matrix_Final-8.17.23.pdf*
5. *PAPs may reject patient applications for enrollment for reasons including: PAP ascertains that employee does in fact have insurance; PAP determines that employee's income makes employee ineligible for assistance.*



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