STATE OF NEW YORK

950

2023-2024 Regular Sessions

IN SENATE

January 9, 2023

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law, in relation to pharmacy benefit managers

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 280-a of the public health law, as added by chapter 828 of the laws of 2021, subdivisions 1, 2, 3 and 5 as amended by chapter 128 of the laws of 2022, is amended to read as follows:

§ 280-a. Pharmacy benefit managers. 1. Definitions. As used in this section, the following terms shall have the following meanings:

(a) "Health plan" means an entity for which a pharmacy benefit manager provides pharmacy benefit management services and that is a health benefit plan or other entity that approves, provides, arranges for, or pays or reimburses in whole or in part for health care items or services, to include at least prescription drugs, for a substantial number of beneficiaries who work or reside in this state. The superintendent shall determine, in his or her sole discretion, by regulation how the phrase "a substantial number of beneficiaries who work or reside in this state" shall be interpreted.

(b) "Pharmacy benefit management services" means the management or administration of prescription drug benefits for a health plan, directly or through another entity, and regardless of whether the pharmacy benefit manager and the health plan are related, or associated by ownership, common ownership, organization or otherwise; including the procurement of prescription drugs to be dispensed to patients, or the administration or management of prescription drug benefits, including but not limited to, any of the following:

(i) mail service pharmacy;

(ii) claims processing, retail network management, or payment of claims to pharmacies for dispensing prescription drugs;

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(iii) clinical or other formulary or preferred drug list development or management;

(iv) negotiation or administration of rebates, discounts, payment differentials, or other incentives, for the inclusion of particular prescription drugs in a particular category or to promote the purchase of particular prescription drugs;

(v) patient compliance, therapeutic intervention, or generic substitution programs;

(vi) disease management;

(vii) drug utilization review or prior authorization;

(viii) adjudication of appeals or grievances related to prescription drug coverage;

(ix) contracting with network pharmacies; and

(x) controlling the cost of covered prescription drugs.

(c) "Pharmacy benefit manager" means any entity that performs pharmacy benefit management services for a health plan.

(d) "Maximum allowable cost price" means a maximum reimbursement amount set by the pharmacy benefit manager for therapeutically equivalent multiple source generic drugs.

(e) "Controlling person" means any person or other entity who or which directly or indirectly has the power to direct or cause to be directed the management, control or activities of a pharmacy benefit manager.

(f) "Covered individual" means a member, participant, enrollee, contract holder or policy holder or beneficiary of a health plan.

(g) "License" means a license to be a pharmacy benefit manager, under article twenty-nine of the insurance law.

(h) "Spread pricing" means the practice of a pharmacy benefit manager retaining an additional amount of money in addition to the amount paid to the pharmacy to fill a prescription.

(i) "Superintendent" means the superintendent of financial services.

(j) "Pharmacy acquisition cost" means the amount that a pharmaceutical wholesaler charges for a pharmaceutical product as listed on the pharmacy's billing invoice.

(k) "Pharmacy benefit manager affiliate" means a pharmacy or pharmacist that directly or indirectly, through one or more intermediaries owns or controls, is owned or controlled by, or is under common ownership or control with a pharmacy benefit manager.

(l) "Pharmacy benefits plan or program" means a plan or program that pays for, reimburses, covers the cost of, or otherwise provides for pharmacist services to individuals who reside in or are employed in this state.

2. Duty, accountability and transparency. (a) (i) The pharmacy benefit manager shall have a duty and obligation to perform pharmacy benefit management services with care, skill, prudence, diligence, and professionalism.

(ii) In addition to the duties as may be prescribed by regulation pursuant to article twenty-nine of the insurance law:

(1) A pharmacy benefit manager interacting with a covered individual shall have the same duty to a covered individual as the health plan for whom it is performing pharmacy benefit management services.

(2) A pharmacy benefit manager shall have a duty of good faith and fair dealing with all parties, including but not limited to covered individuals and pharmacies, with whom it interacts in the performance of pharmacy benefit management services.

(b) All funds received by the pharmacy benefit manager in relation to providing pharmacy benefit management services shall be received by the

pharmacy benefit manager in trust and shall be used or distributed only pursuant to the pharmacy benefit manager's contract with the health plan or applicable law; including any administrative fee or payment to the pharmacy benefit manager expressly provided for in the contract to compensate the pharmacy benefit manager for its services. Any funds received by the pharmacy benefit manager through spread pricing shall be subject to this paragraph. In addition to any other power conferred by law the superintendent shall have the authority to prescribe rules concerning pharmacy benefit manager administrative fees, including limitations on their form and use.

(c) The pharmacy benefit manager shall account, annually or more frequently to the health plan for any pricing discounts, rebates of any kind, inflationary payments, credits, clawbacks, fees, grants, chargebacks, reimbursements, or other benefits received by the pharmacy benefit manager. The health plan shall have access to all financial and utilization information of the pharmacy benefit manager in relation to pharmacy benefit management services provided to the health plan.

(d) The pharmacy benefit manager shall disclose in writing to the health plan the terms and conditions of any contract or arrangement between the pharmacy benefit manager and any party relating to pharmacy benefit management services provided to the health plan including but not limited to, dispensing fees paid to the pharmacies.

(e) The pharmacy benefit manager shall disclose in writing to the health plan any activity, policy, practice, contract or arrangement of the pharmacy benefit manager that directly or indirectly presents any conflict of interest with the pharmacy benefit manager's relationship with or obligation to the health plan.

(f) Any information required to be disclosed by a pharmacy benefit manager to a health plan under this section that is reasonably designated by the pharmacy benefit manager as proprietary or trade secret information shall be kept confidential by the health plan, except as required or permitted by law, including disclosure necessary to prosecute or defend any legitimate legal claim or cause of action. Designation of information as proprietary or trade secret information under this subdivision shall have no effect on the obligations of any pharmacy benefit manager or health plan to provide that information to the department of health or the department of financial services.

(g) The superintendent, in consultation with the commissioner may make regulations defining, limiting, and relating to the duties, obligations, requirements and other provisions relating to pharmacy benefit managers under this subdivision.

3. Prescriptions. A pharmacy benefit manager may not substitute or cause the substituting of one prescription drug for another in dispensing a prescription, or alter or cause the altering of the terms of a prescription, except with the approval of the prescriber or as explicitly required or permitted by law, including regulations of the department of financial services or the department of health. The superintendent and commissioner, in coordination with each other, are authorized to promulgate regulations to determine when substitution of prescription drugs may be required or permitted.

4. Appeals. A pharmacy benefit manager shall, with respect to contracts between a pharmacy benefit manager and a pharmacy or, alternatively, a pharmacy benefit manager and a pharmacy's contracting agent, such as a pharmacy services administrative organization, include a reasonable process to appeal, investigate and resolve disputes regarding multi-source generic drug pricing**, including being below the pharmacy**

acquisition cost. The appeals process shall include the following provisions:

(a) the right to appeal by the pharmacy and/or the pharmacy's contracting agent shall be limited to thirty days following the initial claim submitted for payment;

(b) a telephone number through which a network pharmacy may contact the pharmacy benefit manager for the purpose of filing an appeal and an electronic mail address of the individual who is responsible for processing appeals;

(c) the pharmacy benefit manager shall send an electronic mail message acknowledging receipt of the appeal. The pharmacy benefit manager shall respond in an electronic message to the pharmacy and/or the pharmacy's contracting agent filing the appeal within seven business days indicating its determination. If the appeal is determined to be valid, the maximum allowable cost for the drug shall be adjusted for the appealing pharmacy effective as of the date of the original claim for payment. The pharmacy benefit manager shall require the appealing pharmacy to reverse and rebill the claim in question in order to obtain the corrected reimbursement;

(d) if an update to the maximum allowable cost is warranted, the pharmacy benefit manager or covered entity shall adjust the maximum allowable cost of the drug effective for all similarly situated pharmacies in its network in the state on the date the appeal was determined to be valid; and

(e) if an appeal is denied, the pharmacy benefit manager shall identify the national drug code of a therapeutically equivalent drug, as determined by the federal Food and Drug Administration, that is available for purchase by pharmacies in this state from wholesalers registered pursuant to subdivision four of section sixty-eight hundred eight of the education law at a price which is equal to or less than the maximum allowable cost for that drug as determined by the pharmacy benefit manager.

4-a. Maximum allowable costs. (a) If the national drug code number provided by the pharmacy benefit manager is not available below the pharmacy acquisition cost from the pharmaceutical wholesaler from whom the pharmacy or pharmacist purchases the majority of prescription drugs for resale, then the pharmacy benefit manager shall adjust the maximum allowable cost above the challenging pharmacy's pharmacy acquisition cost and permit the pharmacy to reverse and rebill each claim affected by the inability to procure the drug at a cost that is equal to or less than the previously challenged maximum allowable cost.

(b) A pharmacy benefit manager shall not reimburse a pharmacy or pharmacist in this state an amount less than the amount that the pharmacy benefit manager reimburses a pharmacy benefit manager affiliate for providing the same pharmacist services.

(c) The amount shall be calculated on a per unit basis based on the same generic product identified or generic code number.

(d) A pharmacy or pharmacist may decline to provide the pharmacist services to a patient or pharmacy benefit manager if, as a result of a maximum allowable cost, a pharmacy or pharmacist is to be paid less than the pharmacy acquisition cost of the pharmacy providing pharmacist services.

5. Contract provisions. No pharmacy benefit manager shall, with respect to contracts between such pharmacy benefit manager and a pharmacy or, alternatively, such pharmacy benefit manager and a pharmacy's

contracting agent, such as a pharmacy services administrative organization:

(a) prohibit or penalize a pharmacist or pharmacy from disclosing to an individual purchasing a prescription medication information regarding:

(i) the cost of the prescription medication to the individual, or

(ii) the availability of any therapeutically equivalent alternative medications or alternative methods of purchasing the prescription medication, including but not limited to, paying a cash price; or

(b) charge or collect from an individual a copayment that exceeds the total submitted charges by the pharmacy for which the pharmacy is paid. If an individual pays a copayment, the pharmacy shall retain the adjudicated costs and the pharmacy benefit manager shall not redact or recoup the adjudicated cost.

6. Pharmacy benefit manager additional duties. A pharmacy benefit manager shall:

(a) provide access to its maximum allowable cost prices to each pharmacy subject to the maximum allowable cost price; and

(b) update its maximum allowable cost prices on a timely basis, but in no event longer than seven calendar days from an increase of ten percent or more in the pharmacy acquisition cost from sixty percent or more of the pharmaceutical wholesaler doing business in the state or a change in the methodology on which the maximum allowable cost price is based or in the value of a variable involved in the methodology.

§ 2. This act shall take effect immediately.